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**Dr. Le Cheng
Dr. Paul Robertson**

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editor@ijlld.com

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Foreword

Welcome to the inaugural edition of the International Journal of Law, language and Discourse. Editions will appear quarterly. The journal is part of the Asian EFL Journal Group comprising the Asian EFL Journal, Linguistics Journal, Asian ESP Journal, TESOL Journal, Philippine ESL Journal, Iranian EFL Journal and English as an International language Journal. I warmly welcome our Academic Board and Advisors who come from the four corners of the globe. Some of Editors were also former practicing attorneys who entered the world of Linguistics, English for Specific Purposes and Second Language Acquisitions and Research. Our First Edition features four articles.

Le Cheng and Sin conducted a comprehensive survey of previous studies on courtroom discourse. The studies give an overview of the various aspects and multi-faceted problems of courtroom discourse studied by sociologists and linguists. An overview of the issues concerning and approaches to the studies of courtroom language sheds light on the nature of courtroom discourse. The second article is by Gary Prideaux who examines several cases before the Canadian Human Rights Commission in which the author served as an expert witness. His research resulted in the creation of a “toolkit” for text analysis. The toolkit is first discussed and applied to the selected texts. Prideaux concluded that the texts were racist and anti-Semitic.

Jie Wang examines the defamation case of *Yang v Hu* in which the authors testified as expert witness; the study shows that analyzing and attesting controversial linguistic evidence is indispensable in judicial proceedings. Finally Wang and Sin examines the antithesis of cultural transfer vs linguistic transcoding in translation theory and in particular, analyzes Snell-Hornby’s view on cultural transfer and Catfords’ view on transcoding. It focuses on the clarification of the concept of cultural transfer in translation/legal translation.

We look forward to your readership, support and submissions



Courtroom Language and Discourse

Le Cheng and King Kui Sin

In this paper, we conduct a comprehensive survey of previous studies on courtroom discourse. Courtroom language provides a rich source of data for sociology, applied linguistics, sociolinguistics and other related disciplines. The macro studies investigate the general features of courtroom language from the broader perspectives of language, legal communication, law, society and culture while the micro studies examine the internal structures of courtroom language in relation to specific issues. The two kinds of studies suffice to give us an overview of the various aspects and multi-faceted problems of courtroom discourse studied by sociologists and linguists. An overview of the issues concerning and approaches to the studies of courtroom language will shed light on the nature of courtroom discourse, which are an important aspect of legal discourse.

Keywords: courtroom discourse, macro studies, micro studies, law, society, language

1 Introduction

The study of the interface between law, language and discourse has been variously labeled “forensic linguistics” (e.g. Svartvik, 1968; Kniffka et al., 1996; McMenamin, 2002; Gibbons, 1994a, 2003; Olsson, 2004; Coulthard & Johnson, 2007, 2010), “language and law” (e.g.

Gibbons, 1994b; Kredens & Gozdz-Roszkowski, 2007; Kniffka, 2007; Philbrick, 1949; Levi, 1994; Schane, 2006), or “law and language” (Conley & O’Barr, 1998, 2005), “legal language” (Tiersma, 1999), “legal linguistics” (Mattila, 2006), “jurilinguistics” (Cornu, 2000; Gémár & Kasirer, 2004), and “legal discourse” (Bhatia et al., 2003, 2004; Gotti & Williams, 2010). It has also been further divided into three categories: the language of the law, the language of the judicial process, and language as evidence (Coulthard & Johnson, 2007; Turell, 2008). The most influential works in the area of the language of the law include Alcaraz and Hughes (2002), Bhatia et al. (2005), Kniffka (2007), Levi (1994), Mellinkoff (1963, 1982), Tiersma (1999) and Schane (2006). Notable publications in the area of the language of the judicial process include Berk-Seligson (1990), Conley and O’Barr (1998, 2005), Cotterill (2003), Heffer (2005), Eades (2008), Edwards (1995), Kurzon (1997), Mead (1985), O’Barr (1982), Philips (1998), Posner (2008), Shuy (1993, 1998, 2005, 2006), Solan (1993), Solan and Tiersma (2005), Stygall (1995), Rock (2007), and Wagner and Cheng (2011). Studies on language as evidence include Nolan (1983), McMenamin (1994), Eades (1995), Foster (2000), Ehrlich (2001), Hollien (2001), Rose (2002) and Shuy (2002, 2007, 2010). According to Bhatia et al. (2008, p. 3), “although legal language has long been the focus of attention for legal philosophers and sociologists, its attraction for linguistics and discourse analysts has been of relatively recent origin”.

This study surveys an important aspect of language and law, namely, language in the courtroom, a subfield within the area of the language of the judicial process. Courtroom language provides a rich source of data for sociology, applied linguistics, sociolinguistics and other related disciplines. Considerable and extensive studies of courtroom language have been carried out over the past decades, especially in common law jurisdictions. An overview of the issues concerning and approaches to the studies of courtroom language will shed light on the nature of courtroom discourse, which are an important aspect of legal discourse. In what follows, we will divide such studies into macro and micro studies. Of course the distinction is by no means intended to be a clear-cut one as many of the studies fall into both categories.

2 Macro studies

The macro studies investigate the general features of courtroom language from the broader perspectives of language, legal communication, law, society and culture while the micro studies examine the internal structures of courtroom language in relation to specific issues.

2.1 Language, power and control in courtroom

Language and power has been a major theme of exploration in the works of social philosophers such as Foucault (1971, 1977, 1980) and Habermas (1984, 1992) and sociolinguists such as Gumperz (1982) and Fairclough (1989). Language has been identified as the “primary medium of social control and power” (Fairclough, 1989, p. 3), most notably in legal settings (Coulthard & Johnson, 2007, p. 37) where the use of language is structured in such a way as to facilitate control through the exercise of power (O’Barr, 1982; Conley & O’Barr, 1998, 2005; Cotterill, 2003).

A salient feature of the common law court is that participants’ narrative styles have a direct bearing on the outcome of a trial. Many studies (Conley et al., 1978; O’Barr, 1982; Berk-Seligson, 1990; Conley & O’Barr, 1990, 1998, 2005) have shown that a witness’s credibility is determined to a large extent by his/her narrative style, which falls into two main categories, namely, powerful style and powerless style. In their 1970s study, Conley and O’Barr observed that women tend to use powerless language more frequently than men, which is partially due to the fact that women generally occupy relatively powerless social positions (O’Barr & Atkins, 1980, p. 104). O’Barr (1982, pp. 71-74) found that a witness speaking in a powerful style tends to make a better impression on his/her audience while one speaking in a powerless style tends to be perceived less favorably. And having investigated the manner in which about a hundred self-represented litigants in small claims courts organized and presented their cases, Conley and O’Barr noted that those whose accounts were received more favorably by the court had “exposure to the source of social power, in particular the literate and rule-based cultures of

business and law” (1990, p. 194). According to these studies, powerlessness, generally regarded as typical of female speech (Lakoff, 1975, 1990), is in fact related not so much to gender as to social status and situational power. Wodak-Engel also noted that middle-class defendants “are able to build up an image valued by the court” (1984, p. 97) because they have acquired the implicit speech norms of the courtroom in the process of socialization during childhood. Wodak-Engel therefore concluded that “defendants not socialized in these norms of language are discriminated against, and only MC defendants succeed, as a rule, in good image management before the judge” (1984, p. 97).

Building on their earlier empirical research, Conley and O’Barr (1998, 2005) further analyzed courtroom language at the micro-linguistic level, showing how powerlessness arises as a result of the process of the law. As the legal system gives less credence to those who speak in a powerless style, and as men are more likely to have learned a powerful speech style than women, the law, they argued, manifests “patriarchy at the most elemental linguistic level” (1998, p. 75). Thus for them, the study of courtroom has “important implications for understanding the subtle workings of the law’s patriarchy” (1998, p. 65).

In a somewhat different light, Maynard (1985) examined the exploitation of a defendant’s attributes, such as his race, class and sex as mitigating factors in plea bargaining, and showed how the structure of the language affects his sentencing. He urged that “increased attention must be paid to the structure of language in institutional settings, such as the court, for discourse is the medium by which decisions are made and through which organized discriminatory or nondiscriminatory reasoning practices are sustained” (1985, pp. 174-175).

In a more recent study, Trinch and Berk-Seligson (2002) examined the types of interactional problem that arise from narrative variation in institutional interviews. The factors found most likely to influence narrative outcomes are contextual ones, related to the social roles of participants, the type of communicative activity interlocutors perceive themselves to be engaged in, and their interactional goals. An additional finding is that when expectations of what constitutes

appropriate speech behavior differ, the interlocutor with greater institutional power will try to constrain the speech of the other. Thus, the idea of justice as equal treatment before the law has been shown by a great number of studies not to be upheld by many courts, even though in many cases this did not result from deliberate manipulation on the part of those who made judicial decisions, but rather from the subtle influence of social values through the working of language. As participants' linguistic behavior is to a great extent a reflection of their social classes, the close relationship between social class and justice cannot be more obvious. It is only natural that the power structure of an institutionalized setting is reflected in the use of language. As Goodrich (1984, p. 91) remarked, legal discourse is "pre-eminently the discourse of power". While the exercise of power is often disguised in covert language form, the control of what is said in the courtroom by means of overt linguistic manipulation is another salient feature characteristic of the adversarial system of the common law.

Language in the courtroom may be described as an asymmetrical discourse between court officials and parties to a case, and the language used in asymmetrical encounters may also have different functions from those of the language used in symmetrical situations (Coates, 1995, p. 16). In asymmetrical discourse the more powerful participants have control over the topic while the powerless participants can only display varying degrees of resistance (Danet et al., 1980; Harris, 1984, 1988; Lakoff, 1989, 1990). For Conley and O'Barr (1998, 2005), an important goal of sociolinguistics is to investigate "the most important theoretical issue in law and language: the use of linguistic methods to understand the nature of law and legal power" (1998, p. 6). How lawyers acquire and amass power by means of legal tactics and presentation styles has been examined thoroughly by O'Barr (1982) and Conley and O'Barr (1998, 2005).

Based on his study of some court cases, Philips (1998) argued that the behavior, and particularly the language practices, of United States trial judges, is ideological in nature; in other words, judges are not free of political influence. He remarked that "it is a mistake and a misinterpretation to think of trial court judges as mere implementers of law made by others" (ibid, p. 123). In discussing judges' use of language in legal interpretation, Solan (1993) demonstrated how judges

disingenuously employ linguistic analysis to mask their result-driven legal arguments.

How exercise of control and power in the courtroom is achieved by various means of linguistic manipulation is a central question of a great number of macro studies, which is often noted in the genre analysis and textual analysis of legal discourse.

2.2 Courtroom language as a special discourse type

Another category of macro study takes courtroom language as a special discourse type or discourse within a specific community. Atkinson and Drew (1979), Penman (1987) and Lakoff (1989) used ordinary conversation as a reference point and highlighted the aspects in which courtroom discourse differs from ordinary conversation. Applying ethnomethodology to specific areas such as examination and cross-examination, Atkinson and Drew (1979) showed how courtroom discourse is both similar to and different from ordinary conversation in terms of turn-taking. Penman (1987) equated the rules of courtroom discourse with Grice's Cooperative Principle (1975, 1989). Lakoff (1990, pp. 129-134) listed thirteen shared properties and nine pairs of contrastive features between courtroom and ordinary discourse. Lakoff alerted us to the potential danger of abuse subsisting in any type of discourse and sensitizes us to the need for understanding whatever form of discourse in which we are engaged so that we can "assume responsibility for our communication" (1990, p. 140). Her study is not purely linguistic in nature but cuts deep into the root of the abuse of power in human verbal communication.

Rather than contrasting courtroom discourse with ordinary conversation, Mead (1985) treated courtroom discourse as a highly controlled variety of English discourse. In his study of Malaysian magistrates' court proceedings, Mead (1985) compared courtroom discourse with classroom language on which Sinclair and Coulthard (1975) built their model (hierarchical ranks consisting of act, move, exchange, transaction and lesson) of discourse analysis. According to Mead (1985, p. 21), classroom and courtroom discourse are both controlled by a participant who has institutionalized authority over other participants, but while the former aims to disseminate known information, the latter is concerned with "the collection and evaluation

of new information". More concerned with theoretical considerations, Harris (1988) contended that an analysis of complex discourse such as courtroom discourse requires a more complex model than simplistic ones such as Hasan's (1978) linear model built upon Halliday's (1978) concepts of field, tenor and mode, and Martin's (1985) networks. She suggested that courtroom discourse could be analyzed by means of a "rank scale" similar to Sinclair and Coulthard's (1975) hierarchical ranks designed for the analysis of classroom discourse.

2.3 Courtroom language and discourse community

Courtroom language as discourse also entails an exploration of the relationship between language and social structure, especially between language and social structure in a particular discourse community. This is a mutual operation: on the one hand, communication is shaped and often constrained by the structure and dynamics of the social institutions; on the other hand, these social institutions and the roles and relationships of their members are molded by a particular language use (Candlin, 1994, p. x).

While many critics have endeavored to lay bare the socio-political forces underlying courtroom language, claiming that "legal institutions adopt rules which serve the dominant interest groups in society (Gordon & Nelson, 1988, p. 161), a few scholars have approached it from the more positive perspective of the institutional context in which the court communicates as legitimate. The linguistic features of courtroom discourse, such as "the cats and dogs of law language" (Mellinkoff, 1963, p. 385), are to "preserve the judge's distance and sense of objectivity" (Tiersma, 1999, p. 194), as Halliday (1994) has pointed out, language is the way it is because of what it has to do.

Topf (1992) studied opinions of the United States Supreme Court and showed, along the same line of thinking in light of which Kuhn (1962) investigated the dynamic interaction between paradigm and revolution in the history of science, that their legitimacy is grounded in "the assent of the relevant community" (Kuhn, 1962, p. 93). Similarly, Topf (1992, pp. 26-27) argued that a judicial opinion, couched in a language typical of the adversarial system of the common law, must be perceived as conforming to the established and accepted norms of the legal system and gain the consent of its discourse community.

Coulthard and Johnson (2007, p. 37) also dealt with the duality of courtroom discourse as institutional:

On the one hand we can argue that such language is difficult to understand and therefore distances and disadvantages the lay participant, but an alternative functional perspective is that the formulaic formality is part of the way the participants orient to what is going on.

What a discourse community expects of its professionals is well explicated in the works of Benjamin T. M. Liu (Liu, 2000), a former appeal judge who served both on and off the Bench for over 40 years. He discussed the mindsets and modes of operation of lawyers, judges and court personnel from a professional perspective. In contrasting American and French judicial opinions, Wells (1994) argued that critical insights into the nature of one's own legal system can be gleaned by understanding what one's system is not and such task can only be realized by a comparative analysis, which in fact stresses the awareness of the differences of sub-communities in understanding the same type of legal discourse across jurisdictions.

Similarly, Cheng and Sin (2007), in their corpus-based contrastive study of court judgments, took court judgments not only as a special discourse type but also as a genre within a professional discourse community. Moreover, the sensitiveness to the differences between discourse sub-communities is stressed in the understanding of the discourse variation across jurisdictions. Their studies, though linguistically oriented, took speech acts as manifestations of social and cultural behaviors. This line of research has drawn our attention to the social basis of judicial opinions (or court judgments) and has far-reaching implications for the pragmatic study of legal communication. The mutuality between discourse and community is therefore another salient feature of legal discourse.

3 Micro studies

Micro studies of courtroom language may include stylistic features, rhetoric and language functions, psycholinguistic studies (Charrow & Charrow, 1979; Gibbons, 2003; Loftus, 1979; Mellinkoff, 1963; Schwarzer, 1981; Tiersma, 1999), communication problems of non-

native speakers (e.g. Berk-Seligson, 1990), and problems of court interpretation (e.g. Berk-Seligson, 1990; Sin & Djung, 1994).

3.1 Stylistic features

Stylistic features in the present context include lexical and syntactic features. What Mellikoff (1963, pp. 24-35) described as “mannerisms of the language of the law” (wordiness, unclarity, pomposity and dullness, pomposity in particular) are also features of courtroom language. The ground-breaking research on language variation in the speaking style of witnesses was conducted by O’Barr (e.g. 1982). He identified four varieties of courtroom language, namely, formal spoken legal language, formal standard English, colloquial English and sub-cultural varieties. As we have noted, O’Barr also examined the features of powerful and powerless styles, adopting Lakoff’s characterization of female speech as parameters. In addition, he investigated three other styles, namely, narrative style, fragmented style and hypercorrect style. The main purpose of his study was to ascertain how the speech style of a witness would affect his/her credibility. He designed a number of experiments to establish the correlation and found that speakers of the powerful and/or the narrative style tended to be more convincing than those of the other styles. In addition, sociolinguistic studies of male and female language or speech styles were mainly based on microlinguistic analysis (Holmes, 1997), which used micro linguistic analysis to show “the diverse realizations of the dynamic dimensions of masculinity and femininity” (Holmes, 1997, p. 217).

Contrasting the Chinese judgments of Hong Kong and Mainland China, Wong and Sin (Wong, 2006; Wong & Sin, 2003) noted that while judgments in both jurisdictions share the same style of formality, Hong Kong judgments have the following features: (1) inconsistent in respect of vocabulary and legal terminology; (2) frequent use of vernacular Cantonese words and expressions on the one hand and frequent use of classical Chinese words on the other; (3) adoption of Cantonese and Westernized syntax; (4) elaborate in respect of ratio decidendi, which accounts for 50.36% of the total number of characters in the corpus (as opposed to only 28.9% in Mainland China’s judgments). Wong and Sin (2003) also identified seven stylist features of Chinese court judgments in Hong Kong in comparison with common

written Chinese: (1) more removed from oral discourse; (2) more classical in style; (3) more precise in diction; (4) greater in sentence length; (5) more complex in structure; (6) more condensed in information; and (7) a lower degree of engagement. However, the stylistic features such as the choice of self-reference are not simply the indicators of formality but also representative of and constrained by the power structure of a particular discourse community.

3.2 Rhetoric and language functions

The interrelationship between rhetoric and language functions is also a central theme in the study of courtroom language. As an essential part of a court hearing consists in adducing evidence by questioning witnesses, researchers have always been interested to study the various forms and functions of questioning in the courtroom (Harris, 1984; Philips, 1987; Walker, 1987). What should count as a question has therefore become one of the central issues in recent studies of courtroom language. Harris contended that previous definitions were “unhelpful in illuminating the functions of questions in court discourse” (1984, p. 9). She put forward a functional definition that yields a detailed classification of questions. Likewise Walker (1987, p. 69) classified question forms into four formal categories and identified three functional classes, namely, “field,” “fence” and “corral,” which represent the ways in which the lawyer controls his/her witness.

The majority of linguistic studies of courtroom interaction focus on the restrictive and controlling nature of questions in examination (Philips, 1987, pp. 85-86), such as questioning strategies by legal professionals (Conley & O’Barr, 1998, 2005; Danet et al., 1980), or implicature (Grice, p. 1975) as a rhetorical strategy during question sequences in cross-examination. In what they called “an ethnography of questioning”, Danet et al. (1980, pp. 226-227) identified six features of questions which effected coerciveness, worked out a typology of question forms, and charted the distribution of question forms in direct and cross-examination. An interesting finding of their study was that coercive forms seem more effective in direct examination than in cross examination, which, if proved to be conclusive, would have a direct bearing on questioning techniques.

In pre-trial discovery, lawyers have effectively collected a considerable amount of evidence for the case in question, so that in the trial proper they ask questions not just for information but for other purposes. The function of questioning in direct examination is more of information-checking than of information-seeking (Schiffirin, 1994, pp. 165-169). Questioning witnesses from the same side is to present before the court/ jury all that the witness knows which is relevant and material. The evidence should be presented in such a way as to be clearly understood and persuasive. Direct examination is therefore the phase in a court trial for the co-construction of testimony between advocate and witness, with the former in complete control over the interaction. The dual aim of this type of questioning is to provide the jury with a clear outline of the witness contribution to the narrative, and also to construct a persuasive account (Boon, 1993, p. 100). In cross-examination, questions are mainly used to challenge the credibility of the witness and to deconstruct the narrative of the opponent.

Apart from question form and question-answer sequence, co-speech has also been studied, though not as extensively. Walker (1982) examined the patterns of co-speech in depositions and explored their implications. She observed that co-speech can be structurally divided into mid-clause and end-clause intervention which can in turn be functionally divided into disruptive and non-disruptive co-speech. Her study revealed that disruptive mid-clause intervention of speech initiated by a witness was viewed by counsel as “role encroachment”, an encroachment of the power base from which he/she operated (Walker, 1982, p. 109). Another structure of courtroom discourse, namely, the narrative structure in plea bargaining, was studied by Maynard (1984, 1990). Maynard (1990, p. 92-93) noted that discourse in plea bargaining and trial discourse belong to distinctive types: while trial stories are elicited through question-answer sequences and told by direct participants, plea bargaining stories are told “more spontaneously and uninterruptedly” by “parties at some remove from the original event”. Along a similar line, Cotterill (2003) described how storytelling, framing, cross examination, and reframing work in a trial.

Judicial thinking underlying court judgments is an integrated part of human action and behaviour and turns out to be a dialogic challenge (Weigand, 2000, 2002). Cheng and Sin (2008) argued that dialogue is

of cardinal importance to maintaining the interpersonal relationship between judges and facilitating judgment drafting as a collaborative problem-solving. It is also important for the check and balance between courts and the legislature. A court judgment can therefore be taken as the dialogue between judges as well as one between courts and the legislature. Based on the analysis of some judgments in Hong Kong, they exemplified rhetorical preferences of the dialogue (cf. Weigand & Dascal, 2001), unraveled the underlying pragmatic rationale, and identified rhetorical strategies such as modality and intertextuality for creating space for dialogue.

The functions of judicial documents are also widely discussed in previous works (e.g. Bhatia, 1993; Maley, 1994). In a similar vein, Cheng and Sin (2007, p. 351) argued:

Legal documents can serve a variety of functions, including eliciting information, persuading, memorializing events such as reciprocal communications, or accomplishing performative goals, such as creating or revoking legal relationships. Court judgments, as a special genre of legal discourse community, typically have a performative objective: they are intended to decide or alter legal relationships relevant to some controversy before the court. In fact, more exactly, we should say the decision/disposition part of a court judgment serve the performative function; the other parts of a court judgment have their own functions.

3.3 Communicating and managing meaning

As courtroom discourse involves participants who are not well equipped with the language and knowledge required in the courtroom situation, there have been studies which aim to investigate how those participants cope with communication in the courtroom. Pollner (1979) approached the courtroom as a semantically explicative setting where participants without prior knowledge of what to say and how to behave can perceive and manipulate meanings by observing the behaviour of other participants. He showed how court transactions may provide participants semantic clues and information sufficient to enable them to fully participate in the proceedings. In contrast to non-explicative transactions in which the meaning of an act or utterance is so well-

defined and well-established that it remains unchanged “regardless of what others do with, about, or in response to it” (p. 246), the meaning of an act or utterance in the courtroom is, he noted, constituted by a subsequent act or utterance in the proceedings. Viewing the courtroom as an explicative setting, the study has drawn our attention to the constitutive nature of courtroom discourse as well as to the more general issues in semantics.

Thus, participants’ awareness of the context plays an important role in courtroom discourse. Drew (1985, 1990) explored participants’ orientation to context by examining how they organized and designed their question-answer sequences in cross examinations. As a general principle, he noted, “questions are understood in the light of what has gone before (prompting, prior testimony) as well as anticipated lines of questioning (p. 136). He analysed a number of ways in which counsel designed his questions to cast doubt in a witness’s testimony and in which a witness engineered his answers to combat counsel’s questioning. Though context-specific, Drew’s analysis of competing accounts in cross examination sheds light on “how disagreements are managed in ordinary conversation” (p. 145), an interesting question in discourse semantics.

Turning from the overall context of the courtroom to a narrower domain, Philips (1984) investigated both the linguistic and the nonlinguistic differences in nominal reference to crimes in two different procedures of the American court, namely, the Initial Appearance and the Change of Plea. She found that in the former there is an “absence of sentential framing of noun phrases,” a “shorter length of noun phrases,” and a “smaller amount of postnominal modification” while in the latter reference to crimes is more elaborate and specific (pp. 40-48). The differences in nominal reference to crimes reflect the varying degrees of formality of the two procedures (p. 47) and display two aspects of the communicative competence of participants, namely, a general linguistic knowledge possessed by all participants as displayed in the syntactic variation and a specialized knowledge possessed by lawyers and judges as displayed in the more elaborate forms of reference to crimes (pp. 47-48).

3.4 Psycholinguistic studies

While the studies of question form and speech style in courtroom discourse often offer sociolinguistic interpretations of their data, they are partly psycholinguistic in nature as they are concerned with people's reactions to testimony of different speech styles. One reason why these studies are marked by the lack of conclusive evidence is that no experiment has been conducted to test the hypothesis that different forms of question and different speech styles affect a witness psychologically in different manners resulting in different verbal reactions.

A most well-known psycholinguistic study of courtroom discourse is Charrow and Charrow's (1979) experiments on the comprehensibility of jury instructions. They were designed to test three hypotheses. First, jurors do not adequately understand typical jury instructions. Second, low comprehensibility is caused by certain linguistic constructions. Third, by replacing those problematic constructions while keeping the informational contents unchanged, understanding can be enhanced. The study has enabled us to find out not only the types of linguistic construction that affect comprehensibility but also those that can enhance it.

Another well-known psycholinguistic study was conducted by Loftus (1979) which explored how witnesses' belief about what they had actually witnessed was affected by the wording of questions. The experiments show that beliefs someone acquires as an eyewitness can to a certain extent be modified by ideas smuggled into his mind by means of various linguistic formulation. A witness receives information through perception of the incident. He may also receive what Loftus called "external" information after the incident. Memory is the product of the integration of information from these two sources (p. 78) Loftus's study is relevant to courtroom discourse in that it shows how some of the component words of a question may affect someone's belief about a certain event to which he is a witness. As the use of questions is frequent and inevitable in the courtroom, the witness seems vulnerable to linguistic manipulation by those questioning him.

3.5 Communication problems of non-native speakers

Obviously enough, non-native speakers of the court language suffer an enormous disadvantage when giving evidence in that language. Many

scholars have made contribution to this critical issue (Adams, 1973; Berk-Seligson, 1987, 1990; Bresnahan, 1979, 1991). In a pilot study, Bresnahan (1979) attempted to investigate the ability of the non-native English defendant to testify in his/her behalf and whether such defendants should be given “special language considerations in the courtroom” (p. 565). She discovered that there is a clear correlation between the level of coerciveness of a question and the degree of responsiveness of its answer given by a non-native speaker of English, which is not necessarily the case with a native speaker (p. 571). She also discovered that negative yes/no questions were a source of difficulty for a non-native speaker, thus impairing his credibility when not handled skillfully (p. 571). In a similar vein, Gumperz (1982) examined the extent to which the linguistic and cultural background of a non-native speaker may affect communication in the courtroom. Through the study of a perjury case he observed that the non-native speaker is likely to be misunderstood and that language differences may affect a non-native speaker’s treatment in court.

3.6 Problems of court interpretation

Interpreters are now used with increasing frequency in courts throughout the USA, the Commonwealth and Hong Kong. Court interpreters are necessary to ensure that judges and/or jurors can understand the testimony of defendants, witnesses, and other participants in order to render fair verdicts and decisions. They also serve to protect the rights of parties with limited ability to speak or to understand court language and to facilitate the fair and efficient administration of justice. However, court interpreters must adhere to strict codes of appropriate behavior. Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. It is important to understand the functions of interpreting because, in some settings, more than one interpreter may be required, depending on how many interpreting functions need to be carried out during the same proceeding. In some circumstances, two or more interpreters may be required during one trial in order to perform all of the required interpreting functions. The most frequent settings of interpretation include proceeding interpretation, witness interpretation, and interview interpretation.

Accuracy and completeness is the primary canon for court interpretation, that is, court interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting or adding anything to what is stated or written, and without explanation. Where interpreting services are provided for non-native speakers of the court language, problems arise from various aspects of court interpretation. Lang (1976) identified five types of problematic interpreting: (1) derogatory remarks made by the interpreter; (2) misinterpretation due to carelessness; (3) misinterpretation arising from substituting an order by the reasons for that order; (4) careless paraphrasing; and (5) misinterpreting due to auditory misperception. A more detailed study was carried out by Berk-Seligson (1987) who focused on how the speech style of a witness is changed by the interpreter. Built upon the work of O'Barr, her study showed that interpreters systematically alter the length of witnesses's testimony resulting in the weakening of their force, i.e., rendering their speech style powerless. She identified six categories of change in style: (1) adding hedges; (2) inserting elements understood in the meaning of the original utterances; (3) hypercorrect grammar due to uncontracted forms; (4) rephrasing and repeating interpretations; (5) turning a curt reply into a polite (and even an over-polite) one; and (6) omitting or adding utterance particles or hesitation forms. Rather than a neutral facilitator for court communication, the interpreter, she noted, tends to play an intrusive role affecting the speech style of the witness and consequently creating positive or negative evaluation of the credibility of his testimony.

4. Discussion

The account outlined above suffices to give us an overview of the various aspects and multi-faceted problems of courtroom discourse studied by sociologists and linguists. From a methodological point of view, their studies can be categorized into two main approaches, namely, the sociological approach and the linguistic approach. The sociological approach looks at courtroom discourse more as a social phenomenon than as a linguistic activity. It aims to shed light on certain features of a society and to make sense of an existing social order

through the study of courtroom language. In contrast to the sociological approach, the linguistic approach aims to investigate the various aspects of courtroom discourse from the perspective of language. This broad categorization brings out a major difference in research focus of the two most relevant disciplines, namely, sociology and linguistics. As has been noted, while sociologists look at the courtroom mainly as a social setting where members of a society interact in specific manners that reflect the structure of that society, linguists look at it primarily as a process displaying the various features of language. Historically speaking, the increasing interest in courtroom discourse has been inspired by sociologists rather than by linguists, but with the rapid development of discourse analysis in recent years, courtroom discourse has become a much researched area in discourse analysis and can be regarded as a special topic for discourse analysis. Naturally, different approaches yield different results.

References

- Adams, Charles F. (1973). "Citado a comparecer": Language barriers and due process--Is mailed notice in English constitutionally sufficient? *California Law Review*, 61, 1395-1421.
- Atkinson, J. M., & Drew, P. (1979). *Order in court: The organization of verbal behavior in judicial settings*. London: Macmillan.
- Berk-Seligson, S. (1987). The intersection of testimony styles in interpreted judicial proceedings: Pragmatic alterations in Spanish testimony. *Linguistics*, 25, 1087-1125.
- Berk-Seligson, S. (1990). *The bilingual courtroom: Courtroom interpreters in the judicial process*. Chicago: University of Chicago Press.
- Bhatia, V. K. (1993). *Analysing genre: Language use in professional settings*. London: Longman.
- Bhatia, V. K., Candlin, C. N., & Gotti, M. (2003). *Arbitration in Europe: Legal discourse in a multilingual and multicultural context*. Berlin: Peter Lang.
- Bhatia, V. K., Engberg, J., Gotti, M., & Heller, D. (2005). *Vagueness in normative texts*. Berlin: Peter Lang.

- Bhatia, V. K., Langton, N., & Lung, J. (2004). Legal discourse: Opportunities and threats for corpus linguists. In U. Connor and T. Upton (eds.), *Discourse in the professions: Perspectives from corpus linguistics* (pp. 203-231). Amsterdam: Benjamins.
- Bhatia, V. K., Candlin, C. N., & Engberg, J. (2008). *Legal discourse across cultures and systems*. Hong Kong: Hong Kong University Press.
- Boon, A. (1993). *Advocacy*. London: Cavendish.
- Bresnahan, Mary I. (1979). *Linguistic limbo: The case of the non-native English-speaking defendant in the American courtroom*. Ms. Linguistics Department, University of Michigan.
- Bresnahan, Mary I. (1991). When a response is not an answer: Understanding conflict in nonnative legal testimony. *Multilingua*, 10, 275-293.
- Candlin, C. N. (1994). General editor's preface to language and the law. In J. Gibbons (ed.), *Language and the law* (pp. x-xiii). London: Longman.
- Charrow, R. P., & Charrow, V. R. (1979a). Making legal language understandable: A psycholinguistic study of jury instructions. *Columbia Law Review*, 79(7), 1306-1374.
- Charrow, R. P., & Charrow, V. R. (1979b). Characteristics of the language of jury instructions. In R. Kittredge and J. Lehrberger (eds.), *Sublanguage: Studies of language in restricted semantic domains* (pp. 175-190). Berlin: Walter de Gruyter.
- Cheng, L., & Sin, K. K. (2007). Contrastive analysis of Chinese and American court judgments. In K. Kredens and S. Gozdz-Roszkowski (eds.), *Language and the law: International outlooks* (pp. 325-356). Berlin: Peter Lang.
- Cheng, L., & Sin, K. K. (2008). A court judgment as dialogue. In Edda Weigand (ed.), *Dialogue and rhetoric*. Amsterdam: Benjamins, 267-281.
- Coates, J. 1995. Language, gender and career. In S. Mills (ed.), *Language and gender: Interdisciplinary perspectives* (pp. 13-30). London: Longman.

- Conley, J. M., & O'Barr, W. M. (1990). *Rules versus relationships: The ethnography of legal discourse*. Chicago: University of Chicago Press.
- Conley, J. M., & O'Barr, W. M. (1998). *Just words: Law, language and power* (2nd ed. 2005). Chicago: University of Chicago Press.
- Conley, J. M., O'Barr, W. M., & Lind, E. A. (1978). The power of language: Presentation style in the courtroom. *Duke Law Journal*, 78, 1375-1399.
- Cornu, G. (2000). *Linguistique Juridique*. Paris: Montchrétien.
- Cotterill, J. (2003). *Language and power in court: A linguistic analysis of the O.J. Simpson trial*. Basingstoke: Palgrave.
- Coulthard, M., & Johnson, A. (2007). *An introduction to forensic linguistics*. London: Routledge.
- Coulthard, M., & Johnson, A. (2010). *Handbook of forensic linguistics*. London: Routledge.
- Danet, B., Hoffman, K. B., Kermish, N. C., Rafn, H. J., & Stayman, D. G. (1980). An ethnography of questioning in the courtroom. In R. W. Shuy and A. Ahnukal (eds.), *Language use and the uses of language* (pp. 222-234). Washington, DC: Georgetown University Press.
- Drew, P. (1985). Analyzing the use of language in courtroom interaction. In T van Dijk (ed.), *Handbook of discourse analysis* (Vol. 3, pp. 133-147). London: Academic Press.
- Drew, P. (1990). Strategies in the contest between lawyer and witness in cross-examination. In J. N. Levi and A. G. Walker (eds.), *Language in the judicial process* (pp. 39-64). London: Plenum Press.
- Eades, D. (1995). *Language in evidence: Linguistic and legal perspectives in multicultural Australia*. Sydney: University of New South Wales Press.
- Eades, D. (2008). *Courtroom talk and neocolonial control*. Berlin: De Gruyter.
- Edwards, A. B. (1995). *The practice of court interpreting*. Amsterdam: Benjamins.
- Ehrlich, S. (2001). *Representing rape: language and sexual consent*. London: Routledge.

- Fairclough, N. (1989). *Language and power*. (2nd revised ed. 2001). London: Longman.
- Foster, D. (2000). *Author unknown: On the trail of anonymous*. New York: Henry Holt.
- Foucault, M. (1971). *The Order of discourse*. Paris: Gallimard.
- Foucault, M. (1977). *The archaeology of knowledge*. London: Tavistock.
- Foucault, M. (1980). *Power/knowledge, selected interviews and other writings*. New York: The Harvester Press.
- Gémar, J-C, & Kasirer, N. (2004). *Jurilinguistique*. Montréal: Themis.
- Gibbons, J. (1994a). *Forensic linguistics: An introduction to language in the justice system*. Oxford: Blackwell.
- Gibbons, J. (1994b). *Language and the law*. London: Longman.
- Gibbons, J. (2003). *Forensic linguistics: An introduction to language in the justice system*. Oxford: Blackwell.
- Goodrich, P. (1984). Law and language: An historical and critical introduction. *Journal of Law and Society*, 11, 173-206.
- Gordon, R., & Nelson, W. (1988). Exchange on critical legal studies between Robert W. Gordon and William Nelson. *Law & History Review*, 6, 139-186.
- Gotti, M., & Williams, C. (2010). *Legal discourse across languages and cultures*. Berlin: Peter Lang.
- Grice, H. P. (1975). Logic and conversation. In P. Cole and J. L. Morgan (eds.), *Syntax and semantics, vol.3: Speech acts* (pp. 41-58). New York: Academic Press.
- Grice, H. P. (1989). *Studies in the ways of words*. Cambridge, Mass: Harvard University Press.
- Gumperz, J. J. (1982a). *Discourse strategies*. Cambridge: Cambridge University Press.
- Gumperz, J. J. (1982b). Fact and inference in courtroom testimony. In J. J. Gumperz (ed.), *Language and social identity* (pp. 163-195). Cambridge: Cambridge University Press.
- Habermas, J. (1984). *The philosophical discourse of modernity*. Cambridge: Polity.
- Habermas, J. (1992). *Postmetaphysical thinking*. Cambridge: Polity.

- Halliday, M. A. K. (1978). *Language as social semiotic: The social interpretation of language and meaning*. London: Edward Arnold.
- Halliday, M. A. K. (1994). *An introduction to functional grammar* (1st ed. 1985). London: Arnold.
- Harris, S. (1984). Questions as a mode of control in magistrates' courts. *International Journal of Sociology of Language*, 49, 5-27.
- Harris, S. (1988). Courtroom Discourse as a Genre: Some Problems and Issues. In M. A. K. Halliday and R. P. Fawcett (eds.), *New developments in systemic linguistics* (vol. 2) (pp. 94-115). London: Frances Printer.
- Hasan, R. (1978). Text in the systemic-functional model. In W. Dressler (ed.), *Current trends in textlinguistics* (pp. 228-246). Berlin: de Gruyter.
- Heffer, C. (2005). *The language of jury trial: A corpus-aided analysis of legal-lay discourse*. Basingstoke: Palgrave Macmillan.
- Hervey, S., & Higgins, I. (1992). *Thinking translation: A course in translation method: French to English*. London: Routledge.
- Hollien, H. (2001). *Forensic Voice Identification*. San Diego: Academic Press.
- Holmes, J. (1997). Women, Language and Identity. *Journal of Sociolinguistics*, 1(2), 195-223.
- Kniffka, H. (2007). *Working in language and law. A German perspective*. Basingstoke: Palgrave Macmillan.
- Kniffka, H., Blackwell, S., & Coulthard, M. (1996). *Recent Developments in Forensic Linguistics*. Bern: Peter Lang.
- Kredens, K., & Gozdz-Roszkowski, S. (2007). *Language and the law: International outlooks*. Berlin: Peter Lang.
- Kuhn, T. S. (1962). *The structure of scientific revolutions*. Chicago: University of Chicago.
- Kurzon, D. (1997). *Discourse of silence*. Amsterdam: John Benjamins.
- Lakoff, R. T. (1975). *Language and women's place*. New York: Harper & Row.
- Lakoff, R. T. (1989). The limits of politeness: Therapeutic and courtroom discourse. *Multilingua*, 8(2/3), 101-129.
- Lakoff, R. T. (1990). *Talking power: The politics of language in our lives*. New York: Basic Books.

- Levi, J. N. (1994). *Language and law: A bibliographic guide to social science research in the U.S.A.* Chicago: American Bar Association.
- Liu, T. M. (2000). *How are we judged.* Hong Kong: City University of Hong Kong.
- Loftus, E. F. (1979). *Eyewitness testimony.* Cambridge, MA.: Harvard University Press.
- Maitland, F. W. (1950). *The Constitutional History of England.* Cambridge: Cambridge University Press.
- Maley, Y. (1994). *The Language of the Law.* London: Longman.
- Mattila, H. (2006). *Comparative legal linguistics.* Aldershot: Ashgate.
- Maynard, D. W. (1984). *Inside plea bargaining: The language of negotiation.* New York: Plenum Press.
- Maynard, D. W. (1985). The Problem of Justice in the Courts Approached by the Analysis of Plea Bargaining Discourse. In T.A. van Dijk (ed.), *Handbook of Discourse Analysis, Vol. 4, Discourse in Society* (pp. 153-177). London: Academic Press.
- Maynard, D. W. (1990). Narrative and narrative structure in plea bargaining. In J. N. Levi and A. G Walker (eds.), *Language in the judicial process* (pp. 65-95). New York: Plenum.
- McMenamin, G. R. (1994). *Forensic stylistics: A workbook.* California: California State University.
- McMenamin, G. R. (2002). *Forensic linguistics: Advances in forensic stylistics.* Florida: CRC Press.
- Mead, R. (1985). *Courtroom discourse.* University of Birmingham: Birmingham Press.
- Mellinkoff, D. (1963). *The language of the law.* Boston: Little Brown.
- Mellinkoff, D. (1982). *Legal writing: Sense and nonsense.* New York: Scribners.
- Nolan, F. (1983). *The phonetic bases of speaker recognition.* Cambridge: Cambridge UP.
- O'Barr, W. M. (1982). *Linguistic evidence: Language, power, and strategy in the courtroom.* New York: Academic Press.
- O'Barr, W. M, & Atkins, B. K. (1980). "Women's language" or "powerless language"? In Sally Mc-Connell-Ginet, Ruth Borker and Nelly Furman (eds.), *Women and language in literature and society* (pp. 93-110). New York: Praeger.

- Olsson, J. (2004). *Forensic linguistics: An introduction to language, crime and the law*. London and New York: Continuum.
- Penman, R. (1987). Discourse in courts: cooperation, coercion and coherence. *Discourse Processes*, 10, 201-218.
- Philbrick, F. A. (1949). *Language and the law: The semantics of forensic English*. New York: Macmillan.
- Philips, S. U. (1987). The Social Organisation of Questions and Answers in Courtroom Discourse. In L. Kedar (ed.), *Power through discourse* (pp. 83-113). Norwood, NJ: Ablex.
- Philips, S. U. (1998). *Ideology in the language of judges: How judges practice law, politics and courtroom control*. New York: Oxford University Press.
- Posner, R. A. (2008). *How Judges Think*. Cambridge, Mass.: Harvard University Press.
- Rock, F. (2007). *Communicating rights: The language of arrest and detention*. Basingstoke: Palgrave Macmillan.
- Rose, P. (2002). *Forensic speaker identification*. London: Taylor and Francis.
- Schane, S. (2006). *Language and the law*. New York: Continuum.
- Schiffrin, D. (1994). *Approaches to discourse*. Oxford: Blackwell.
- Schwarzer, W. W. (1981). Communicating with juries: Problems and remedies. *CALIF. Law Review*, 69, 731-40.
- Shuy, R. W. (1993). *Language crimes: The use and abuse of language evidence in the court room*. Oxford and Cambridge: Blackwell.
- Shuy, R. W. (1998). *The language of confession, interrogation, and deception*. Thousand Oaks, CA. and London: Sage.
- Shuy, R. W. (2002). *Linguistic battles in trademark disputes*. London: Palgrave.
- Shuy, R. W. (2005). *Creating language crimes: how law enforcement uses (and abuses) language*. New York: Oxford University Press.
- Shuy, R. W. (2006). *Linguistics in the courtroom: A practical guide*. New York: Oxford University Press.
- Shuy, R. W. (2007). *Fighting over words*. New York: Oxford University Press.

- Shuy, R. W. (2010). *The language of defamation cases*. New York: Oxford University Press.
- Sin, K. K., & Djung, S. H. (1994). The Court Interpreters' Office. In M. S. Gaylord and H. Traver (eds.), *The Hong Kong criminal justice system* (pp. 137-144). Hong Kong: Hong Kong University Press.
- Sin, K. K., & Roebuck, D. (1996). Language engineering for legal transplantation: Conceptual problems in creating common law Chinese. *Language and Communication*, 16(3), 235-254.
- Sinclair, J., & Coulthard, M. (1975). *Towards an analysis of discourse: The English used by teachers and pupils*. Oxford: Oxford University Press.
- Solan, L. M. (1993). *The language of judges*. Chicago: University of Chicago Press.
- Solan, L. M., & Tiersma, P. M. (2005). *Speaking of crime: the language of criminal justice*. Chicago: University of Chicago Press.
- Stygall, G. (1995). *Trial language: Differential discourse processing and discursive formation*. Amsterdam: Benjamins.
- Svartvik, J. (1968). *The Evans statements: A case for forensic linguistics*. Gothenburg: University of Gothenburg Press.
- Tiersma, P. M. (1999). *Legal language*. Chicago: University of Chicago Press.
- Topf, M. A. (1992). Communicating legitimacy in US Supreme Court opinions. *Language and Communication*, 12, 17-29.
- Trinch, S. L., & Berk-Seligson, S. (2002). Narrating in protective order interviews: A source of interactional trouble. *Language in Society*, 31(3), 383-418
- Turell, M. T. (2008). Malcolm Coulthard and Alison Johnson 2007: An Introduction to Forensic Linguistics: Language in Evidence. *ATLANTIS*, 30(2), 155-160.
- Wagner, A., & Cheng, L. (2011). *Exploring courtroom discourse: the language of power and control*. London: Ashgate.
- Walker, A. G. (1987). Linguistic manipulation, power, and the legal setting. In L. Kedar (ed.), *Power through discourse* (pp. 57-80). Norwood, NJ: Ablex.

- Weigand, E. (2000). The dialogic action game. In M. Coulthard, J. Cotterill and F. Rock (eds.), *Dialogue analysis VII. Working with dialogue* (pp. 1-18). Tübingen: Niemeyer.
- Weigand, E. (2002). The language myth and linguistics humanised. In R. Harris (ed.), *The language myth in western culture* (pp. 55-83). Surrey: Curzon.
- Weigand, E., & Dascal, M. (2001). *Negotiation and power in dialogic interaction*. Amsterdam: John Benjamins.
- Wells, M. (1994). French and American judicial opinions. *Yale Journal of International Law*, 19, 81-133.
- Wodak-Engel, R. (1984). Determination of guilt: Discourse in the courtroom. In C. Kramarae, M. Schulz and W. M. O'Barr (eds.), *Language and power* (pp. 89-100). Beverly Hills: Sage.
- Wong, P. K. (2006). A Comparative Study of the Legal Judgments of Hong Kong and the Mainland China. *Language teaching and linguistic studies*, 2, 35-41.
- Wong, P. K., & Sin, K. K. (2003). Linguistic issues in the Chinese court judgments of Hong Kong. In Q. S. Zhou, J. Wang and J. Z. Su (eds.), *New perspectives in the study of language and law* (pp. 193-201). Beijing: Law Press.

Le Cheng received his B.A. from China university of Political Science and Law, M.Phil. in Law from Southwest University of Political Science and Law, M.Phil. in Linguistics from Zhejiang University, and Ph.D. from City University of Hong Kong. He is now a research fellow at Hong Kong Polytechnic University, and concurrently a research professor and acting associate director at the Research Center for Legal Translation, China University of Political Science and Law and a distinguished guest professor at Zhejiang University. His research interests include language and law, legal translation, discourse analysis, corpus linguistics and semiotics.

King Kui Sin received his B.A. and M.A. from the Chinese University of Hong Kong and his Ph.D. from the Southern Illinois University. He is now Associate Professor at the Department of Chinese, Translation and Linguistics, City University of Hong Kong, teaching legal translation, translation theory, and philosophy of language. He worked in the Judiciary as a court interpreter

from 1978 to 1980. From 1980 to 1987 he was engaged by a French oil corporation based in China operating training in English, translation and interpretation. He served on the Bilingual Laws Advisory Committee from 1990 to 1997 and appointed MBE (Member of the Most Excellent Order of the British Empire) by the British Government for his contribution to the translation of Hong Kong laws into Chinese. His research interest and publications are in the areas of language and law, and the philosophy of language. Address: Department of Chinese, Translation and Linguistics. Email: ctsinkk@cityu.edu.hk.



Linguistic Contributions to the Analysis of Hate Language

Gary D. Prideaux

This paper examines several cases before the Canadian Human Rights Commission in which the author served as an expert witness. The data consist of texts taken from Internet or telephone message sites which allegedly communicate racist and/or anti-Semitic content, thereby contravening the Canadian Human Rights Act. To analyze such materials systematically, it was necessary to collect and organize research from diverse areas of linguistics into a coherent analytic instrument, resulting in the creation of a “toolkit” for text analysis. The toolkit is first discussed and then applied to the selected texts. It is concluded that the texts are indeed racist and anti-Semitic. It is also concluded the methodology is appropriate for the analysis of any texts, including those involving persuasion and manipulation.

Keywords: expert witness, discourse, text analysis, hate language

1 Introduction

Language is the common currency of both lawyers and linguists. As Engborg and Trosberg (1997) point out, lawyers formulate texts with special purposes, such as contracts, and exploit the rhetoric of persuasive language when arguing cases. As the editors of *Forensic*

Linguistics point out in their introduction at the launching of that journal (French & Coulthard, 1994), linguists have been called upon from time to time by both the police and officers of the courts to provide expert opinions on matters of language. Linguists, especially those with an interest in the analysis of corpora, discourse, and texts, investigate those structures, principles, conventions, and rules which are used in language production and comprehension. Lawyers and linguists therefore have an overlapping interest in language use, even though they approach language issues from quite divergent perspectives.

When asked to offer expert opinions on matters of language which have significant legal import, linguists are generally asked to provide analyses of linguistic materials from a scientific perspective, analyses which have the potential for far-reaching legal consequences. And, as is often the case with those providing expert testimony, it is crucial that the court has a clear and unambiguous understanding of exactly what is being claimed in an often highly technical area.

Thus, the linguist as expert witness is challenged to make clear to the court precisely the kinds of analytic methods that are brought to bear on the particular issues under contention. It is imperative that the court have a clear understanding of what the linguist is doing, how the methodologies have been established, how they have attained scholarly acceptability, and how they apply to the particular circumstances. This often is not a simple task, and in some instances it can be extremely difficult to present complex and technical issues in such a way as to be understandable to a lay audience, even a highly educated one.

The purpose of the present paper is to respond to this challenge by indicating how linguistics, and in particular discourse analysis and pragmatics, can be applied to yield analyses of corpora which are cited as legal evidence. This research, therefore, falls within the general domain of “language as evidence” as discussed by, for example, Coulthard and Johnson (2007). The texts under consideration here are alleged to contain “hate language” and as such contravene Section 13.1 of the *Canadian Charter of Rights and Freedoms*. Section 13.3 of this fundamental Canadian document states:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to

be so communicated, repeated, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

First, however, some personal background is in order. In 1993, I was called upon by the Canadian Human Rights Commission to provide a discourse analysis of four texts which, the Commission claimed, offended the *Charter*. The texts were transcriptions of messages played on a telephone line sponsored by the “Canadian Liberty Net” and were directed primarily against homosexuals and to a lesser extent against Jews and people of colour. In order to provide a cogent written analysis, it was necessary to preface the analysis with a brief description of linguistic research methods and then apply these to the texts. I was later called upon to testify as an expert witness in the Canadian Human Rights Tribunal (“Payzant and the Canadian Human Rights Commission versus Canadian Liberty Net and Tony McAleer and Harry Vaccaro Liberty Front”). It is important to notice that Tribunals of the Canadian Human Rights Commission have legal status, are conducted according to Canadian court principles, and may impose penalties if the complaints are upheld. The case was successfully pursued and the “Canadian Liberty Net” was forbidden from further activities.

In 1995, I was called upon again to provide an analysis and to testify before a second tribunal (“Chilliwack Anti-Racism Project Society and the Canadian Human Rights Commission versus Pastor Charles Scott and the Church of Christ in Israel”). The texts were again transcriptions of phone-in messages, directed primarily against Jews. This case was also successfully pursued.

In 1997, the Canadian Human Rights Commission asked me to provide an extensive written analysis of some 31 messages taken from a U.S. website called the “Zündelsite” (www.zundelsite.org) which contained much material written by the Holocaust denier Ernst Zündel, who was at the time a Canadian resident but a German citizen. In order to do justice to the very large amount of materials provided to me, I

found it essential to construct an extensive set of analytic tools to deal with the variety of texts. I provided the analysis and testified before the Tribunal for two and a half days as an expert witness in “The Canadian Human Rights Commission and S. Citroen et al. versus Ernst Zündel”. This was by far the most challenging case I worked on, and it extended over more than five years, with many delays and postponements, challenges, and legal appeals. The case had far-reaching implications for the legal interpretation of the Charter and for the power of Parliament as represented by Section 13.1, cited above.

In what follows, I will draw upon the analyses constructed for those cases as well as upon my own experiences as an expert witness. The paper is structured as follows. This section presents a brief explication of the methods of linguistic analysis which can be applied to the analysis of texts. In next section, some sample texts are provided, along with partial analyses built upon those methods. The final section offers some general observations and conclusions from the analyses.

2 The Toolkit

In order to analyze the texts in a systematic way, it was necessary to gather research and methodologies from diverse areas of linguistics and organize them into a coherent analytic instrument. The result of this synthesis was the creation of a “toolkit” for text analysis. This instrument was not only useful for the analysis of the texts but was also a convenient way to present often complex linguistic concepts to members of the Tribunal in a compact and user-friendly form. That is, it provided a kind of map or catalogue of the components used in the analyses.

Rather than recapitulate the steps involved in putting the resulting set together, I will simply present its outline. Table 1 specifies the areas of linguistics which were found to be relevant in undertaking the analysis, along with a characterization of those aspects of each field which could be brought to bear.

Table 1

A Toolkit for Text Analysis

Modules	<u>Relevant Components and Functions</u>
<i>Pragmatics</i>	Grice's (1975) Cooperative Principle (and Four Maxims) Sperber & Wilson's (1995) Relevance Principle shared cultural and world knowledge (Green, 1989; Levinson, 1983; Leech, 1983)
<i>Lexical Selection</i>	revealing speaker/writer attitudes (Brown & Yule, 1983) containing propositional information (Renkma, 1993) containing presuppositions (Levinson, 1983; Blakemore, 1992)
<i>Information Management</i>	fore-/background information (Givón, 1993) given (shared)-new information (Prideaux, 1993) bridging functions for coherence, cohesion (Givón, 1983)
<i>Semantics</i>	lexical and sentential meaning, propositional content, inference, entailment, semantic relations (synonymy, etc.), speech act functions (Green, 1989; Sperber & Wilson, 1995; Renkma, 1993)
<i>Syntax</i>	principles of sentence organization, anaphora, quantification, etc. (Fox, 1987; Renkma, 1993)
<i>Rhetorical Structure</i>	strategies used to build or refute an argument; strategies of persuasion (van Dijk, 1984, 1992; Greenberg et al., 1988; van Dijk et al., 1997)

While it is clearly the case that the rough taxonomy of Table 1 could be restructured in a variety of ways, the toolkit is nevertheless a

useful organizational framework. At this point, it is helpful to illustrate each of the modules briefly.

The *pragmatics* module focuses on the study of language use from the perspective of social, conversational, and psychological principles (see, inter alia, Leech, 1983; Levinson, 1983; Green, 1989; Blakemore, 1992). An important contribution to an understanding of the pragmatic principles involved in discourse participation stems from the work of H. P. Grice (1975), and further elaborated on by, among others, Green (1989), Fox (1987), and Sperber and Wilson (1995). Grice's major insight was to formulate what he called the *cooperative principle* of discourse, in which he suggested that in order for a discourse to advance smoothly and appropriately, the speaker typically adheres to four maxims, presented in Table 2.

Table 2

Grice's (1975) Maxims

Maxim	<u>Description</u>
<i>Quantity</i>	make your contribution as informative as is required; do not make your contribution more informative than is required
<i>Quality</i>	do not say what you believe to be false; do not say something for which you lack sufficient evidence
<i>Manner</i>	avoid obscurity of expression; avoid ambiguity; be brief; be orderly
<i>Relevance</i>	be relevant; make your contribution fit into the discourse

Grice observed that, in accordance with the cooperative principle, a hearer normally assumes that the speaker is adhering to the maxims. Of course, within a particular discourse, any one of the maxims might be violated. For example, if a speaker says more (or less) than is required, the *maxim of quantity* is violated. Or, if the speaker deliberately lies, misleads, or asserts something for which no evidence is available or adduced, the *maxim of quality* is violated. Or, if a

speaker utters a vague or ambiguous comment, the *maxim of manner* is violated. Or, when asked a question on a particular subject, if an individual responds with information on another topic, the *maxim of relevance* is violated. Participants in a discourse normally assume that the four maxims are operative, and when one or more is violated, miscommunication can occur. Since this is the case, the cooperative principle can be viewed as a meta-condition holding for any normal discourse. In contrast, the overt suspension of the cooperative principle occurs only when there is a specific reason to do so as, for example, when someone tells a joke or makes a pun.

When encountering a text, the reader's task is to construct a mental representation in order to interpret it, the result of which is the reader's *meaning representation*. Contributions to that meaning representation come from all the modules discussed here, with the reader drawing information from all sources to arrive at the most reasonable interpretation.

A central source contributing to the meaning representation of a discourse is the particular *lexical items* selected by the speaker. Words carry with them a rich complex of meanings, both inherent and connotative. A verb like *know*, for example, has as a part of its meaning that an *experiencer* of the knowledge is required, that the speaker asserts the veracity of that which is known, etc. For a sentence like

1. Fred forgot how to prove the theorem.

the speaker implicitly asserts that Fred cannot now prove the theorem. Similarly, the use of a particular word can invite the hearer to a specific interpretation which is not overtly present in the sentence. For example, if a speaker says (2a),

- 2 a. Fred forgot to bring his coat.
- b. Fred did not forget to bring his coat.

the normal interpretation for the hearer is that Fred did not bring his coat. However, if the speaker says (2b), the normal interpretation might be that Fred did bring his coat, even though the sentence would still be true even if Fred intentionally left his coat at home. In such cases, the presence of additional information is crucial for the hearer's correct interpretation, and in the absence of that information, misleading conclusions might be drawn.

The speaker/writer's *attitude* toward the content of the text can be represented by lexical choice, as well as by the use of written devices, and through the exploitation of rhetorical devices. For example, if a writer writes,

3. Fred provided a beautiful proof of the theorem.

the choice of the adjective *beautiful* reflects the writer's attitude toward the proof, just as a negative attitude might be reflected if *beautiful* were replaced with *awkward*. Similarly, if one were to say (4a) instead of (4b),

4 a. Sadly, Fred arrived after the party was over.

b. Happily, Fred arrived after the party was over.

we see two very different attitudes on the part of the writer. And of course, the reader, following the Grician maxims, interprets the utterances accordingly. Thus, the collocation of words, their co-occurrence within a discourse, can serve as an effective means to represent the attitude of the writer.

A common written device for expressing a writer's attitude is the use of quotation marks around a particular word or phrase to signal that the writer is distancing him/herself from the veracity of the expression. Such *scare quotes* indicate that the writer intends to draw special attention to his or her attitude toward the expression. For example, if one were to read a sentence such as

5. John buys *Playboy* "only" to read the short stories.

the reader would infer that the writer disbelieves John's assertion that his only interest in the magazine is the fiction. An analogous form is used in the spoken language, where the scare quoted phrase is placed under heavy stress and contrastive intonation.

Information management refers to the ways the writer organizes a text to reveal such factors as which elements are important (foregrounded) and which are less important (backgrounded), as discussed for example by Givon (1993). The foreground/background distinction is typically coded in English by clause types. For example, in

6. Fred ate his dinner while listening to the news.

The reader takes as foregrounded the content of the main clause and as background that of the subordinate clause.

Another information management strategy which encompasses both syntax and semantics is the *given-new principle*. *Given* information is defined as that which is known by the writer/speaker and shared by the reader/hearer, while *new* information is that which the writer knows and which the writer assumes the reader does not know. The basic notion is that when a new piece of information is introduced into a discourse, it is new for the hearer, but of course known to the speaker. Thus, in

7. A little dog wandered into the room.

a little dog is viewed as new information and this is coded syntactically by the use of the indefinite article *a*. However, when the same entity is later referred to, it typically is coded by either a definite article (e.g., *the dog*) or by a pronoun (e.g., *he, it*, etc.). The given-new principle states that within a discourse, given (shared) information is introduced before new and functions as a kind of mental address for the reader, such that the reader can attach new information to some relevant point in the discourse.

The *semantics* module in a sense encompasses all the others, though in this particular case, it is useful to restrict it to such concepts as speech acts (e.g., assertion, denial, interrogation, etc.), semantic roles, propositional content, and the like. For example, in reading

8. Fred claimed that Sam broke the window.

the reader understands that the sentence consists of two propositions, each consisting of a predicate and its arguments (roughly, P1 = (claim, Fred, P2) and P2 = (break, Sam, window) where each proposition is syntactically coded by a clause. Moreover, the reader understands that Fred believes the content of the second proposition, that *Fred* is the agent of the verb *claim*, that *Sam* is the agent of the verb *broke*, *the window* is the semantic *patient* of the verb, that the speech act function of the sentence is assertion, etc.

Similarly, the *syntactic* module is reflected in the other modules as well. Here, we focus on the syntactic codings for such phenomena as event ordering, anaphora, and topic continuity. For example, when reading

9a. Sam jumped on his bike and fled the scene.

we tend to infer that Sam fled on the bike, even though this is not overtly stated. If, however, we encounter

9b. Sam fled the scene and jumped on his bike.

we do not infer that Sam's initial departure was on his bike, but that a later stage it was.

Or, for example, if we read

10. Fred broke the window and then he ran away.

we assume that *he* stands in an anaphoric relationship with *Fred*. However, in the presence of additional contextual information, such as "John urged Fred not to hit the ball toward the house", *he* might conceivably refer to *John* rather than *Fred*. The *default value* of the reference, however, is normally that reference which requires the minimal effort to make the association, via the principle of *relevance* (Sperber & Wilson, 1995). The principle of *topic continuity* therefore says that the writer intends the reader to construct the simplest and most immediately relevant interpretation of pronouns, nouns, NPs, etc. This principle will play a crucial role in some of the analyses below.

The final module of the toolkit, and one which is used especially often in polemical discourse, is that of *rhetorical devices*, including, for example, rhetorical questions, the stipulation of some proposition without a valid reason, or the use of *epithets* as code expressions for some particular entities (as in *egghead* for *intellectual*).

In some rhetorical questions, it is crucial that a particular presupposition be accepted for the question to be sensible. In a question like (11a) as opposed to (11b),

11 a. Don't you believe in democracy?

b. Do you believe in democracy?

it is presupposed that you, the reader, should believe in democracy. In the second case, however, there is no such presupposition: the question is information-seeking and not rhetorical at all. We are all familiar with such loaded questions as "Has Fred stopped beating his wife?" In order to answer to this question felicitously, either positively or negatively, one must first subscribe to the proposition that Fred is a wife-beater.

Of the many rhetorical devices available, some stand out as particularly important in the analysis of polemical discourse. One such device is the use of a set of terms, a kind of *code*, to refer to a group, while another is one which singles out or *targets* a group and then attributes some properties to that group. Yet another takes the properties of select members of a group and projects these, through

generalization, on to all members of the group. One of the most notorious devices, and one which is found frequently in the anti-Semitic literature, is one which *inverts* or reverses roles, such that victims are portrayed as aggressors, while the aggressors are presented as unfortunate victims. Finally, the *alibi* strategy uses different senses of single word in different places and blurs the distinctions among the senses. These common rhetorical strategies are defined in Table 3.

Table 3
Some Common Rhetorical Strategies

Strategy	<u>Description</u>
<i>targeting</i>	a particular group or entity is singled out, to which some particular characteristics are attributed
<i>inversion</i>	a particular expression with its commonly held meaning is inverted, such that its meaning changes to its opposite, as in instances in which victims are changed into aggressors and aggressors become victims
<i>code</i>	employs the use of metaphor and establishes a series of expressions laden with negative associations in order to construct a network of interrelated and often interchangeable terms
<i>generalization</i>	the attributes of a particular instance are projected upon the superordinate category to which that particular instance belongs
<i>alibi</i>	involves the equivocal use of words, wherein important terms and expressions are given a special, often restrictive definition in one location and are then used subsequently and without notice in a different, often broader, meaning to lead to logically untenable and misleading conclusions

In summary, extensive research into the structure of discourse reveals that the interpretation of any particular text is governed by a variety of syntactic, semantic, and pragmatic factors; that a meaning representation is much more than just the literal meanings of the words and the sentences; that both explicit and implicit information are used; that bridging assumptions are constructed; that pragmatic knowledge is exploited; that various rhetorical strategies are employed; and that participants' attitudes colour interpretations. The resulting toolkit can then be applied to the analysis of specific texts. We now turn to an analysis of selected passages of alleged hate language.

3 Sample Texts and Analyses

The passages selected here for analysis are taken from materials provided by the Canadian Human Rights Commission. These were downloaded from an Internet site (the Zündelsite) by agents of the Commission and other complainants and constituted materials on the basis of which the Canadian Human Rights Commission, in conjunction with others, launched a complaint against Ernst Zündel, a German national living in Canada. I was asked to prepare analyses of a large number of passages, but in the interests of brevity, only a few are discussed here.

The first three examples are taken from a document called "66 Questions and Answers on the Holocaust". This is a Holocaust denial document presented in a pseudo-scholarly style which takes the form of 66 specific questions and answers ostensibly dealing with commonly asked questions and misunderstandings about the Holocaust. The passages are cited in quotations, directly as taken from the Web site.

Question 41. Can bodies be burned in pits?

No. It is impossible for human bodies to be totally consumed by flames in this manner because of lack of oxygen.

In order to make sense of Question 41, the reader must accept a crucial presupposition, namely that such burning would result in total consumption of the remains. There is absolutely no evidence offered for this presupposition, and no evidence is given for the claim of the

impossibility of total consumption in the answer. Moreover, quite the wrong verb is used here, namely *burn*. Obviously, virtually anything can be burned in pits. However, those (Jews) who claimed that they saw bodies being burned in pits used the term *burn*, rather than *incinerate*, the appropriate verb to indicate total consumption. Thus, the answer simply does not relate to the putative claim of first-hand observers. Grice's maxims of both quality and relevance are violated, and lexical slight-of-hand is used to turn the reader from the real claim to a non-sequitur.

Question 47. If six million people had been incinerated by the Nazis, what happened to the ashes?

That remains to be "explained". Six million bodies would have produced many tons of ashes, yet there is no evidence of any large ash depositories.

This question presupposes that the Nazis did incinerate six million people, although serious historians have not made that particular claim. The claim is instead that the Nazis killed six million Jews (and another five to six million others), but not that all the six million Jews were *incinerated*. In order to make sense of this question, a "fact" must be accepted which has never been seriously proposed. Moreover, there is a second and more obvious flaw in the answer as well. Even if six million were claimed to be incinerated and no ash deposits were found, this in itself does not mean that the incinerations did not take place. As every serious scientist recognizes, the absence of evidence is not evidence of absence.

Finally, the true tone of this document is revealed by not only the absence of serious scholarly form, but more crucially by a remarkable cynicism, exemplified in Question 39.

Question 39. What is the difference if six million or 300,000 Jews died during the Second World War?
5,700,000.

This answer crassly trivializes human life by making a sick play on the ambiguity of the phrase "What is the difference...?" The author

represents his dismissive attitude to the value of Jewish lives by exploiting the mathematical sense of difference rather than its ethical and moral sense. It is difficult to imagine a more powerful means of showing disdain and utter contempt for a group of persons.

A more thorough analysis of the entire document reveals that the 66 questions actually mislead rather than inform the reader. The fact that the document is cloaked in a matter-of-fact type of language does not give it legitimacy and, in fact, serves to single out Jews and portray them as liars, criminals, and opportunists.

The second passage is taken from “An Open Letter from the Zündelsite to all principled Freedom-of-Speech activists globally: We Are In Need of Intervenors!” The passage is:

To claim that World War II was fought by the Germans, as the Holocaust Lobby incessantly claims, just to kill off the Jews as a group, is a deliberately planned, systematic deception amounting to financial, political, emotional and spiritual extortion. The “Holocaust,” first sold as a tragedy, has over time deteriorated into a racket cloaked in the tenets of a new temporal religion - replete with martyrs to the Faith, holy shrines, high priests like Wiesel and Goldhagen, and theologians of the Faith such as Raul Hilberg, Deborah Lipstadt et al.

This passage offers a host of opportunities for analysis and interpretation. We begin with the use of the verb *claim* in the first sentence. This verb takes as its complement a clause whose truth is asserted to be a part of the belief system of the one making the claim, as we saw in the discussion of (8) above. Thus, in the first sentence of the passage, the clause “*that World War II was fought by the Germans ... just to kill off the Jews as a group*” is asserted to be a true claim made by a group called the “*Holocaust Lobby*”. However, no evidence is given for this claim, no citation is offered, and in fact the assertion violates both the maxims of quality and relevance. The use of *just* also leads the reader to believe that the “*Holocaust Lobby*” is claiming that this is the only reason the war was fought.

The use of the term *Holocaust Lobby* entails an implicit meaning that such a well-defined group actually exists and it is constituted of

those, including Jews, who advocate the reality of the Holocaust. Moreover, Jews, as members of the Holocaust Lobby, have predicated of them such negative properties as deception and financial, political, emotional and spiritual extortion. This collocation of expressions and association of terms enables the covert assertion that Jews as a group are deceivers and extortionists. Using the *target* strategy, the writer of the passage clearly singles out a group, Jews, and then attributes negative properties to them.

The second sentence contains a passive relative clause associated with the subject *The "Holocaust"*, namely *first sold as a tragedy*. Passive structures without overt agent noun phrases (as would be the case for a passive such as *first sold as a tragedy by the Jews*) are used when the agent is either shared information or is understood by topic continuity through the maxim of relevance. In this particular case, the reader is invited to assume that the agent is the *Holocaust Lobby*, which was introduced in the previous sentence. Moreover, the use of scare quotes around the expression "*Holocaust*" reveals the writer's skeptical and dismissive attitude toward the events encapsulated in that word. In that same relative clause, *sell* is used in its metaphoric sense of *promote* or *convince*, and it at the same time takes on attributes of shady, illicit, and negative commercialism, invoking hucksterism and racketeering, leading to a negative set of attributes stereotypically associated with Jews during the Third Reich, and still present in much anti-Semitic literature.

The content of the relative clause, then, is that initially the *Holocaust Lobby* convinced some (unspecified) persons that the Holocaust was a tragedy, implying that the writer disputes this claim, and in the second sentence that the *Holocaust Lobby* has turned the Holocaust into a racket masked as a religion.

One important consequence of this passage is that the term *Holocaust Lobby* has been established as a negative epithet, a code term for Jews. The *code* strategy has been used to single out all Jews and to cast them in a negative light. The text attempts to establish the falsehood of the Holocaust and then to treat this as if it were information shared by the writer and reader. Finally, through the *target* strategy, the writer associates Jews with a raft of negative (and stereotypically anti-Semitic) qualities. The passage invites the reader to

join the writer in the belief that the Holocaust is not true and that those who assert its truth are in fact evil. In this case, the *reversal* strategy is used to turn the victims of the Holocaust, the Jews, into the aggressors.

The next passage for analysis is taken from a Zündelsite document called “Urgent Appeal For Your Cooperation” and states:

In other words, this time I want to expose and unravel this facet of the “Holocaust” as the driving force for the entire “Holocaust” extortion industry.

I am particularly looking for material where the “Holocaust” was used or invoked or implied or where “survivors” were implicated in crimes, rackets, shady deals, extortion or war crimes against Germans or, later, British Palestine Police, the Palestinians in Gaza, the West Bank and Israel, the Lebanese in Sabra and Shatila, and in the 1967 and 1976 Egyptian wars, where Jews used the “Holocaust” as an excuse for their crimes.

In the first paragraph, the writer asserts, by the use of scare quotes, skepticism toward the Holocaust and also asserts the existence of an activity or endeavor labeled *the ... “Holocaust” extortion industry*. The writer’s attitude that this activity is illegal or illicit is reflected by the use of the negative term *extortion* to modify *industry*. The term *industry* itself evokes a commercial, bureaucratic, production-line set of associations which, when associated with *Holocaust*, also evokes the dispassionate business-like aspects of the Final Solution in Nazi Germany. The term *Holocaust industry*, like the term *Holocaust Lobby* discussed earlier, serves as a negative epithet for Jews. The writer asserts a disbelief in the Holocaust and an intention to expose its untruth.

The second paragraph explicitly asserts that Jews committed crimes. The term *Jew* is used for the group and not for a subset of this group. However, the force of the first part of the passage is that the writer is seeking evidence for the assertion that Jews committed crimes. The term “*survivors*”, placed in scare quotes, reveals the writer’s skepticism about the existence of, and derision toward, such individuals. Here the *alibi* strategy is used since on the one hand, the writer denies the existence of the “*survivors*” and of their suffering while, on the other hand begging for evidence of evil conduct on the part of the

survivors in order to justify their suffering, which was just denied. If the writer denies the existence of such persons, it is a contradiction to assert that they could be “...*implicated in crimes, rackets, shady deals, extortion or war crimes...*”. On the other hand, if the writer’s use of scare quotes indicates an attitude of derision toward the individuals, they must exist in order for the writer to assert that they carried out such crimes.

The Holocaust is implicitly justified by these arguments because, via the *reversal* strategy, its victims, the Jews, are represented as evil people who got what they deserved. The thrust of the two passages is that the writer asserts that Jews are criminals, while at the same time seeking for evidence to support the assertion. The overt request for supporting evidence is unnecessary if supporting evidence is already in the possession of the writer, since otherwise the request would violate the maxims of *quantity*, *quality*, and *relevance*.

It is sometimes useful to take conclusions drawn from an analysis and represent them schematically. A schematic analysis of this particular text can be represented as follows:

- I (= the writer)
1. a. assert the existence of a Holocaust extortion industry
 - b. want to expose (1a)
 2. a. assert I need evidence to support (1a)
 - b. since I do not have adequate evidence to support (1a)
 3. a. assert that Holocaust survivors, if they exist, were involved in
 - crimes, rackets, shady deals, extortion, and war crimes
 - b. assert that Jews are criminals
 - c. assert that Holocaust survivors deserve the treatment they got in the Holocaust
 4. a. assert that Holocaust survivors do not exist, since there was no Holocaust.

This passage can thus be seen to exhibit internal contradictions, to assert that Jews are criminals, and to acknowledge implicitly the need

for evidence to support this assertion, implying in turn that the writer does not possess such evidence.

The final passage offered for analysis is taken from a Zündelsite “Power Letter” of July 1996. It states in part:

The day of global reckoning is dawning. The Jewish Century is drawing to a close. The Age of Truth is waiting to be ushered in, and we will be its ushers.

This passage, brief as it is, constitutes a covert threat against Jews. Here, the writer contrasts the *Jewish Century* with the *Age of Truth*. This contrast itself constitutes a rhetorical device which pits the two terms against one another along the particular dimension of *truth*. The contrast implies that the *Jewish Century*, the twentieth century, is dominated by lies. The use of *we* in the paragraph also needs an interpretation. Who are its referents? The relevance principle invites the interpretation that *we* refers to those who oppose the Jews and threaten to lead the way in their destruction. When *we* is read in its inclusive sense (that is, including both the writer and the reader), the reader is invited to be a member of the writer’s group. Furthermore, *we will be the ushers* invites the reader to challenge Jews and oppose them by violence.

These few passages constitute a tiny sample of the texts found in the anti-Semitic materials taken from the Zündelsite. Their overall individual and collective thrust is to portray Jews in a highly negative light while attempting to accomplish two goals: to deny the existence of the Holocaust and to turn the victims of the Holocaust into aggressors. The subtext is to resurrect Nazi ideology, give it legitimacy through hate and targeting, and to extol the virtues of National Socialism.

Detailed linguistic analyses of these materials and many more like them reveal that they do single out Jews, among others, as targets for hatred and contempt. It must be emphasized that these materials do not constitute simple expressions of freedom of speech, since they violate a broad range of linguistic, pragmatic, lexical, and discourse principles in their attempt to obfuscate, lie, and mislead. Only through a clear and detailed analysis, based on well-established scientific principles of linguistic analysis, can the obvious nature of such texts be shown to be

what they are, crude and misleading polemical attempts to spread racist views.

It might be of interest to the reader to learn that although the Zündel case began in 1997, it was not concluded until 2002. After extensive testimony from dozens of witnesses, even including Mr. Zündel's former wife, and after numerous postponements, challenges to the Tribunal's legitimacy, and legal appeals, the Tribunal did offer up its decision on January 18, 2002. In its 101 page ruling, the Tribunal found that the material from the Zündelsite was likely to expose Jews to hatred or contempt and concluded that Mr. Zündel had breached the *Canadian Human Rights Act*. Shortly thereafter, Mr. Zündel "denied Canada" and fled to the United States on a temporary visa. However, when the visa expired, the American authorities deported him back to Canada. He applied for refugee status in Canada, the same country he had earlier "denied". He was not granted refugee status but was rather imprisoned upon his return and later deported to Germany, where he had previously been convicted *in absentia* of the crime of Holocaust denial. He was imprisoned upon arriving in Germany.

4 Discussion and Conclusions

It is a commonplace observation that hate language is easy to identify, but notoriously hard to define. In the examples above and others like them, the question is not really whether such passages are hateful in a technical or legal sense, but rather how that claim can be demonstrated. How, for example, are we to know that these passages are not just jokes or tongue-in-cheek gestures? We presume that the average/ordinary reader (that is, one not aligned to a racist and anti-Semitic ideology) will view such materials seriously and not as poor attempts at humour.

What then is the analytic contribution here? I suggest that what specific linguistic analyses of texts, such as those offered above, actually accomplish is to provide an overt, structured framework which reveals the linkages, the associations, the presuppositions, and attitudinal aspects of the writers of the messages. Such analyses provide a means to demonstrate why and how such messages carry the weight they are intuitively recognized as carrying.

Linguistic analysis attempts to reveal and bring to our awareness those principles that we tacitly know and follow when we engage in discourse. We do not consciously know a rule of grammar which associates a simple question like “Has John eaten?” with its declarative counterpart “John has eaten”, a rule which some linguists describe as moving the inflected verb *has* from its normal declarative position to a sentence-initial position. Yet when we utter questions of this sort, the sentences we produce correspond precisely to such a rule of grammar. Similarly, when we contrast the meanings of sentences containing a verb like *know* with those containing *doubt*, as in “Jerry knows/doubts that Fred attended the party” we distinguish between two claims that Jerry is making. In the case of *know*, Jerry is asserting the truth of the clause “Fred attended the party”, whereas in the case of *doubt*, he is asserting his hesitation and questioning its truth. All speakers of English tacitly know these distinctions and rules, even if though not directly and consciously available to us. In fact, few people (other than linguists, perhaps) ever bother about such things.

Similarly, in the analysis of texts and, in our case, the analysis of hate language texts, the contribution that the linguist can provide is to make clear and explicit those principles and rules which govern our discourse, and how they are used in both our speaking and understanding as they guide us to the construction of meaning. Put differently, the contribution of the linguist is to make overt and to place on the table for analysis the facts, principles, and rules involved in the construction of discourse, either in its creation or in its understanding.

Thus, a fine-grained linguistic analysis of texts is not a simple pedantic exercise, but one which, based on extensive scholarship and well-established empirical evidence, gives us a deeper understanding of what we might in hindsight call the obvious. It allows us to understand how we draw the inferences we draw, how we ascribe attitudes to writers and speakers, how we share presuppositions, and how networks of associations are created. Linguistic analyses of texts reveal their fabric, their internal structure, their contradictions, their internal (in)consistencies, their assumptions, their goals, and their means. It unveils that which is just below the surface, allowing us to see the relationships and connections with clarity and precision.

For these reasons, linguistic analysis provides an important contribution to a fuller understanding of the nature and organization of all discourse, not just the language and discourse of hate. Perhaps even more important, however, is the fact that such analyses can be applied not just to hate language, but to any texts. In particular, they can be applied to ordinary discourse without regard to its polemical or rhetorical intent. That this is the case can be readily seen in the examples offered in the second section above, in which ordinary texts and utterances can be shown to harbor far more meaning and content than their words alone reveal.

Discourse, be it written or spoken, is highly complex, extremely rich in both what it represents explicitly and what it infers covertly. In discourse, we use the vast reservoirs of our language in a normal and natural way. But it is also the case that such devices and conventions can be bent to the service of manipulation and deception. By understanding how our language works we can be ever more vigilant in guarding against those who would use it to misguide and deceive us.

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References

- Blakemore, D. (1992). *Understanding utterances. An introduction to pragmatics*. Oxford: Blackwell.
- Brown, G., & Yule, G. (1983). *Discourse analysis*. Cambridge: Cambridge University Press.
- Chafe, W. (1994). *Discourse, consciousness, and time: The flow and displacement of conscious experience in speaking and writing*. Chicago: University of Chicago Press.
- Coulthard, M., & Johnson, A. (2007). *An introduction to forensic linguistics*. London: Routledge.
- Engberg, J. & Trosborg, A. (Eds.) (1997). *Linguists and lawyers: Issues we confront*. Tostedt: Attikon Verlag.
- Fox, B. A. (1987). *Discourse structure and anaphora*. Cambridge: Cambridge University Press.
- French, P., & Coulthard, M. (1994). Forensic linguistics: Editorial introduction. *Forensic Linguistics, 1*, vi-ix.
- Givón, T. (1983). *Topic continuity in discourse: Quantified cross-language studies*. Amsterdam: John Benjamins.
- Givón, T. (1993). Coherence in text, coherence in mind. *Pragmatics & Cognition, 1*, 171-227.
- Green, G. (1989). *Pragmatics and natural language understanding*. Hillsdale, NJ: Erlbaum.
- Greenberg, J., Kirkland, S. L. & Pyszcynski, T. (1988). Some theoretical notions and preliminary research concerning derogatory ethnic labels. In Smitherman-Donaldson, G., & van Dijk, T.A. (Eds.), *Discourse and discrimination* (pp. 74-92). Detroit: Wayne State University Press.
- Grice, H. P. (1975). Logic and conversation. In P. Cole & J. Morgan (Eds.), *Syntax and semantics, Vol 3: Speech acts* (pp. 41-58). New York: Academic Press.
- Johnson-Laird, P. (1983). *Mental models*. Cambridge, MA. Harvard University Press.
- Leech, G. (1983). *Principles of pragmatics*. London & New York: Longmans.

- Levi, J. N. (1994). Language as evidence: The linguist as expert witness in North American courts. *Forensic Linguistics*, 1, 1-26.
- Levinson, S. C. (1983). *Pragmatics*. Cambridge: Cambridge University Press.
- Prideaux, G. D. (1993). Subordination and information distribution in oral and written narratives. *Pragmatics & Cognition*, 1, 51-69.
- Prince, E. F. (1981). Toward a taxonomy of given-new information. In P. Cole (Ed.), *Radical pragmatics* (pp. 223-256). New York: Academic Press.
- Renkma, J. (1993). *Discourse studies*. Amsterdam: John Benjamins.
- Schiffrin, D. (1994). *Approaches to discourse*. Oxford: Blackwell.
- Sperber, D., & Wilson, D. (1995). *Relevance* (2nd edition). Oxford: Blackwell.
- Stubbs, M. (1983). *Discourse analysis: The sociolinguistic analysis of natural language*. Chicago: University of Chicago Press.
- van Dijk, T. A. (1984). *Prejudice in discourse: An analysis of ethnic prejudice in cognition and discourse*. Amsterdam: John Benjamins.
- van Dijk, T. A. (1992). Discourse and the denial of racism. *Discourse and Society*, 3(1), 87-118.
- van Dijk, T. A., Ting-Toomey, S., Smitherman, G., & Troutman, D. (1997). Discourse, ethnicity, culture and racism. In T. van Dijk (Ed.), *Discourse as social interaction* (pp. 144-180). London: Sage.
- Zündelsite (1996). www.zundelsite.org.

Gary D Prideaux received his Ph.D. in Linguistics from the University of Texas at Austin in 1966. He taught at the University of Alberta from 1966 until his retirement in 1999. He was a Fulbright Scholar in Japan (1967-68). He was the recipient of several Social Sciences and Humanities research grants and is the author of numerous articles and books in the areas of psycholinguistics and discourse analysis. He served as department chair for two terms. He now lives in retirement on Gabriola Island, British Columbia, with his wife Pam and their Airedale, Saki. Address: 1257 McGillvary Ave., Gabriola Island, British Columbia V0R 1X2, Canada. Email: gprideau@ualberta.ca.



Analysis and Attestation of Linguistic Evidence in Judicial Practices

Jie Wang

On the basis of analysis of the mobile messages between the plaintiff and the defendant in the defamation case of *Yang v Hu* in which the authors testified as expert witness, this study shows that analyzing and attesting controversial linguistic evidence is indispensable in judicial proceedings. The expert opinion related to such kinds of linguistic evidence can help judges in maintaining the strength to the proof of the linguistic evidence. The main themes approached in this study are: the absence of the analysis and attestation of the key linguistic evidence in the court judgment, analysis of the linguistic evidence in the mobile messages as the linguistic evidence of the case, and status quo of legislation on expert witness of linguistic evidence in China.

Keywords: linguistic evidence, analysis and attestation, sexual hint

1 Introduction

Language is a complicated social-cultural phenomenon. Linguistic evidence involves idea of legal science, the scientific intension and the essence of the rule-of-law society. It is a very important research topic, which merits our in-depth study; that is, it is necessary to have a thorough understanding, a deep realization and an accurate grasp of the words encoded in the legal evidence. The calling upon of linguists as expert witness has been noted since early 1980s, though the cases were relatively rare then. With the increasing number in cases involving

reputation, especially in the post-net epoch, linguist expert witnesses have attracted some attention, though far from enough, from law professionals and judicial practitioners. Studies on linguistic evidence can be well noticed in many studies both in China (Cheng & Wang, 2007; Wang, 1999; Wu, 2002) and outside of China (e.g. Coulthard, 2004; Coulthard & Johnson, 2007; Kniffka, 2007; Shuy, 1993, 2007, 2010; Solan, 1998). These studies are undoubtedly valuable for the present case-based study.

In the context of legal language in the information ages, it is a fact in judicial practices in China that the cases involving linguistic disputes are going up. The judicial practices have proved that there is indistinct and vague analysis of linguistic evidence applied in judicial acts, in which the deficiency can be noticed in the capacity of analyzing and attesting for some investigators concerned. An inaccurate analysis and attestation of linguistic evidence will be undoubtedly detrimental to the impartial enforcement of law. Therefore, we must pay close attention to the analysis and attestation of linguistic evidence in studying legal language. We should make scientific analysis of the obscure and ambiguous linguistic evidence to excavate and dig up the real purpose of the words covered by the obscure and ambiguous words, and to eliminate the ambiguity so as to help the court in making an appropriate judgment of the legal fact. This study is not a comprehensive analysis of the legal significance and the categorization of the linguistic evidence. It is only a thinking derived from the key linguistic evidence presented in the case of *Yang v Hu* in the matter of infringing upon reputation.

2 Case brief

According to the judgment delivered by the trial court, in the late half of 2006 Hu (the defendant) was acquainted with Yang (the plaintiff) by recommendation of Hu's friends. During the time of recruitment of the crew for a TV drama, which was to be directed by the plaintiff, the defendant expressed her intention to play a part in the TV drama, and the plaintiff sent the playbook of the TV drama to the defendant through e-mail as well. During that period, the defendant joined the dinner-parties of friends at the invitation of the plaintiff, and they were

in regular communication with each other by sending mobile messages as well. In August 2006, the crew finally decided not to select the defendant as a role in the TV drama. On 24 August 2006, the defendant set up her individual net daily record on Sina network (hereinafter: blog) and published her article entitled “Having no choice but to do so?” It was stated and recorded in the article that the plaintiff, taking advantage of his position and power as the director of the TV drama, had asked the defendant to assist at wine dinner parties for many times and sent her affectionate mobile messages, giving sexual hints, and that the defendant would have been accepted to play a role in the TV drama subject to her consent to have sexual relations with him. After the defendant refused such a sexual invitation, the plaintiff finally withdrew his promise to select her as a role in the TV drama.

In the article, the defendant censured the plaintiff for taking advantage of his position as an artist, a poet, editor in chief and director to look for game, and with this, attacked the hidden rules in the film, TV and entertainment circles, in which it seems a common practice that it is necessary for an actress to be subject to having sexual relations with the director in order to play a role.

In the judicial proceedings, the defendant applied for calling for the material (files) of the contents of the mobile messages sent by the plaintiff to the defendant from 1 June 2006 to 31 August 2006. After investigation and examination, the application of the defendant was considered to be valid, so the court called for the contents of the mobile messages between the plaintiff and the defendant from 1 June 2006 to 31 August 2006 from Beijing Mobile Communication Co. Ltd.

The content of the words of the mobile messages-communications between *Hu v Yang* (verified in the first review) is translated as follows:

1. (i) Hu: Have you been very busy recently?
(ii) Yang: Aha, aha, it won't stop me missing you, darling!
2. (iii) Hu: Come to get together someday when you are free!
(iv) Yang: I don't want to go out; I just want you to come in.
3. (v) Hu: I'm stupid. It's too abstruse. I can't understand it.
(vi) Yang: Then, let it be.
4. (vii) Hu: Is the action on 15 August?

- (viii) Yang: Of course, shooting a TV drama isn't a trifling matter.
5. (ix) Hu: May I have an opportunity to cooperate with you?
- (x) Yang: You haven't come in. How can we get in cooperation?
6. (xi) Hu: What did you mean by "come in"?
- (xii) yang: It's to satisfy my missing. (author's translation)

The defendant held that the contents of the messages sent by the plaintiff to the defendant during this period, such as "I have been very busy, but it won't stop my missing you, darling!", "I don't want to go out; I want you to come in", "Since You haven't come in, how can we cooperate", "It is to come into my missing and satisfy my missing", "I'm missing you, darling!" etc., had the potential of sexual hints. The plaintiff hadn't raised any objection to the truth of the contents of the mobile messages, stating that parts of the wordings in the above mentioned mobile messages were the wordings of ridiculing used by the plaintiff as a poet, so the plaintiff argued that the words "I want you to come in" meant the wish of the plaintiff for the defendant to bring her funds into the crew, and that "my missing" was of the similar meaning. The trial court did not give much consideration to the mobile messages, which led to the appeal from the defendant. The defendant then asked the author of this paper to testify as expert witness before the court. Unfortunately, the appellate court sustained the original decision, still without putting much weight on the strength of linguistic evidence give by the author.

3 Analysis and discussion

As will be shown in the following analysis, the analysis and attestation of the mobile messages between the plaintiff and the defendant as the key linguistic evidence of the case done by the court is not precise, thorough and unsound. Due to the deficiency of analysis and attestation of linguistic evidence during the court proceedings, the decision based upon the so-called legal facts is naturally doubtful. It is therefore not surprising that after the delivery of the judgment by the trial court, the defendant refused to accept it and took insufficiency in analyzing and

attesting linguistic evidence as one of the major grounds for appeal. In an exceptional case, if there are certain obscure wordings of the contents of the linguistic evidence, which may lead to a dispute, a scientific analysis of linguistic communication by experts of related disciplines (such as linguists) is needed.

3.1 Deficiency in analysis of linguistic evidence

The written judgment of the first instance of the case involves the key linguistic evidence of the case – the mobile messages-communications between the plaintiff and the defendant. Due to the absence of the analysis and attestation of the linguistic evidence, there aroused vague room for thinking of “inner conviction” in the court’s maintenance of the legal fact of the case. This can be noticed in the following extract in the trial of the first instance:

Concerning the section that in her article (i.e. the defendant’s words signed on the blog on the Sina web – the author’s note) the defendant says that the plaintiff has sent her disgusting messages, it has been verified that there were mobile messages between the plaintiff and the defendant from 26 July to 5 August 2006. Though, judged *from the angle of general social understanding, there are some relatively affectionate wordings and obscure words in the messages from the plaintiff, which may cause ambiguity, they are not enough to be maintained that the plaintiff sent the sexual hints.* After the article published on the blog, it has had certain repercussions in public, which has led to negative criticism from mass of people towards the plaintiff, making his human dignity belittled... (*emphasis added*)

This extract, especially the emphasized part, is worth to be thought over and commented. The result of general public understanding reflects the social accumulation of the traditional Chinese culture to a certain degree, forming the social normal concepts of universal significance, including the normal concepts of sexual culture in people’s mind. Therefore, one may say that the public understanding is the lowest limit for the public judgment over the social public morality, which should be taken seriously by the court. According to the benefit

of doubt and with the presupposition that the contents of the words of the mobile messages have been verified by the court, the result of the general public understanding should be to the dependant's advantage, instead of being used to prove the negative influence on the plaintiff.

In the linguistic evidence, what kind of purpose of linguistic communication does it transmit in the expression that "there are some relatively affectionate wordings and obscure words"? If such a state of affairs appeared in judicial adjudication, i.e. the content stated in the linguistic evidence has its specific characteristics – "some obscure words", "cause ambiguity" and so on. The cognition of the strength to prove of the linguistic evidence is usually beyond the scope of business of the judges, and the linguistic evidence has to be analyzed by experts of related disciplines and the result of analysis is expected to submit to the court for attestation. To resolve the dispute between the plaintiff and the defendant of the case on the mobile messages as linguistic evidence, we can ask the linguists for linguistic analysis of the contents of the linguistic communication to develop the real semantic meaning covered by ambitious words so as to find the real purpose of communication, while considering the purpose of the words understood by both sides of the communication. Only in this way can we get a better understanding of the legal fact in dispute to make a proper judgment for the just enforcement of law.

However, the trial court seemed reluctant to ask for linguist expert to analyze the linguistic evidence, as noted in its judgment:

The above mentioned facts, including the article published by the defendant on her blog, the relevant reports of news media, the negative comments of the public upon the plaintiff published in the network, records of the mobile messages between the plaintiff and the defendant from 1 June 2006 to 31 August 2006 and the statements of both clients, serving as the evidence of the case, and being a matter of record, are in proof of the case.

The court has not analyzed the contents of the evidence of the mobile messages concerned, and neither analyzed nor attested the explanation by Yang's attorney and then had them as evidences of the case

recorded in the written judgment. The written judgment based on such a fact is obviously unjust, which caused the appeal from the defendant.

3.2 Analysis of the speech chain and the rounds of communication

There are 12 sentences in the mobile messages – communication between Hu and Yang, which constitute six rounds of communication. The overall intention of the wordings of the six sentences in Hu's speech is very clear, i.e. in hope of striving for a part to play in the TV drama directed by Yang. The sentence (ix) is the most straightforward expression of such an intention.

We can see that there is a branching out of their respective intentions of communication in the first round: in sentence (i) Hu sent out her message of greetings of her own accord to Yang, using a normal sentence of etiquette of communication. From the subsequent sentences (vii) and (ix), we can confirm that Hu got in touch on her own initiative with director Yang to enquiry whether she could have a chance to play a part in the TV drama, but in Yang's response [sentence (ii)], he made use of the subject under discussion to put over his own ideas, leading the topic of communication to "missing you", moreover, followed up with "darling!" Yang's intention of communication is, obviously, different from Hu's, if interpreted in association with Yang's responses [sentences (ii), (iv), (x) and (xii)]. Thus, from the beginning in the first round of communication in Yang's so called "ridiculing", we can see there is a touch of enticements.

In the second round of communication, Hu could still cope with Yang's response [sentence (ii)], sending sentence (iii) "Come to get together someday when you are free!" However, Yang's response [sentence (iv)] "I don't want to go out; I just want you to come in!" had made Hu have no choice. Yang's impure motive from his wordings aroused Hu's vigilance. By instinct, she made response "I don't understand" to protect herself. Since then starts the third round of communication. In the meantime, if it had been really like the explanation of Yang's attorney at the debate before the trial court that "it means that he [Yang] wants Hu to bring her funds to the crew", Yang would have made explanation in his response [sentence(vi)], but the linguistic fact reflected in the messages is otherwise – there has

never been the topic of “bring funds into the crew” in the context of this mobile message, neither has it been in the previously arranged words. It is possible that such a meaning of words as “bring funds into the crew” may appear under given conditions. However, “Hu has never told Yang about her financial conditions, how could Yang expect Hu to bring her funds into the crew?” (citing Hu’s attorney before the trial court). Therefore, the interpretation of the expression “come in” is constrained by various factors but in any case it is impossible to mean “bring funds into the crew” by “come in” in the given linguistic context.

In the fourth round of communication, Hu’s words [sentence (vii)] had directly kept to the point of the topic of shooting the TV drama, asking in sentence (ix) in the 5th round of communication the question: “May I have an opportunity to cooperate with you?”. Up to this point, Hu was always explicitly expressing her intention of communication, whereas Yang’s response was somewhat surprising. The inconsistency between the intentions of communication between both sides has created obstacles in communication. Thus, in the followed 6th round of communication, Hu naturally questioned Yang closely [sentence (xi)]: “What do you mean by *come in*?” Finally, Yang emphasized clearly in a relative sense that he wanted her to “satisfy my missing”. An ordinary person of a reasonable sense can realize at once that Yang had always followed up his ideas in the 1st round of communication, using obscure words to convey another intention of communication, which is inconvenient to be expressed explicitly.

3.3 Analysis of the linguistic context

Any linguistic communication occurs within certain linguistic contexts. A linguistic context is the context of linguistic communication, which includes the interested parties, the background, events, topics, time and scene of the linguistic communication. It is necessary to recognize the following factors of the linguistic context to analyze and attest the messages.

We can summarize the relevant social linguistic context covers the factors such as time, scene and the interested parties as follows:

The mobile messages occurred from 26 July to 5 August 2006 with Beijing as the scene. Yang is the plaintiff, male, 44 of age, the head of CCTV classic studio. In the case Yang is in his capacity as a producer,

screen author, director of a TV drama, chief-editor of a poetic magazine. Such an identity of Yang entails the internal factor of linguistic context - power to decide the parts of actors / actresses in the TV drama. Hu is the defendant, female, 25 of age, graduate of the opera major from Shanghai Conservatory of Music, which implies the internal factor of linguistic context: performance-lover, seeking opportunities to develop her potentialities in Beijing, having to look to Yang for help, i.e. having the intention to play a role in a TV drama directed by Yang.

Based on the factors of the social linguistic context, we may reasonably conclude that this civil dispute has taken place in Beijing performing arts circles between Yang, an authority with many titles in one such as a producer, a screen author and a director, and Hu, a young actress, “wandering toward the North” seeking a job. On the basis of the contents of the sentences from the mobile messages-communications between Hu and Yang, which contained their respective speech chains, we can come into conclusion after analysis as follows:

Hu sent mobile messages to Yang on her own initiative, hoping to play a part in the TV drama directed by Yang. Her wordings have always been around this intention. Her wordings are clearly expressed. Yang’s responses have always been a departure from the messages sent to him by Hu. His wordings are affectionate → obscure → ambiguous, but the first sentence and the last sentence in his speech chains are always around the “missing”, so the real intention of his linguistic communication has been implied /hinted by his covert and obscure wordings.

3.4 Analysis of “hint”

Hint is to produce an impact on someone’s mind and act in an implicit and indirect way, making someone think and act according to the will of the hinter to achieve his aim. There are two kinds of hints: one is the “self-hint” – an individual psychology, and the other is “hint by others” caused by the compact on oneself produced by others’ words and attitude. In this case, the hint using ambiguous wordings given by Yang to Hu belongs to the “psychological hint by others”. It contains:

The psychological hint – “missing”;

The environment hint – “to come in” (to come in to me);

The deterrent hint – “You haven’t come in, how can we cooperate?”, (asking a question in reply – to strengthen the dynamics of the hint).

The condition hint – “satisfy my missing”.

With the order of the speech chains formed by the six of Yang’s messages, the dynamics of the hint has gradually been strengthened. Upon receipt of the above-mentioned Yang’s messages of hint, there aroused a “self-psychological hint” in Hu’s mind, which implies her not to rise to the bait. So, we can say that Hu’s saying “I don’t understand” is just the shields to protect herself from Yang’s trap. The differences between the aims of communications between both sides created the obstacles to words cognition in the process of communication - Hu’s saying “I don’t understand”. It is the surface meaning of language, that is, the external level of the linguistic context sent to the other party, the inner hint of which is for self-protection, refusing Yang’s motives of hint.

As stated above, Yang’s direction of words has not clearly responded to the other party’s requirement (i.e. “if it is possible to cooperate with him”), but pointed to “I want you to come in, to satisfy my missing” and taken this as the condition to cooperate with him. Yang’s aim of communication has been hidden in the covert linguistic context covered by his obscure words of hint. If one doesn’t understand the above-mentioned background of the linguistic context, taking only the wordings literally, one can never understand what Yang meant. On the basis of scientific definition of “hint”, Yang’s wordings tally with the conception of “hint”, i.e. to produce an impact on Hu’s psychology and act by using implicit words and in an indirect way of saying to achieve his aim as expected – to “come in” and to come into his “missing” and to “satisfy his missing”. There is only one interpretation of the context of the speech chains of Yang’s messages, and no other interpretation of the linguistic information can be found.

3.5 Analysis of the ambiguity

There is ambiguity in languages and words. Therefore, we cannot rule out the existence of ambiguity, which gives sexual hints in this particular case; however, there is possibility to clear up ambiguity in a given linguistic context. Ambiguity is not the basic attribute of

wordings. It is an extraordinary state of language. Arising of ambiguity is the result of application of language and skills of language application as well, which can be manipulated by users of language. Since the trial court of the case could point out the ambiguity in the contents of the messages sent by Yang to Hu, then the proof of the meaning of the wordings of the linguistic evidence cannot be given on the basis of the interpretation of the words said by Yang's side only (e.g. Yang's saying that "come in" means "let Hu bring her funds into the crew"); instead, it should also take into account Hu's cognition of these words.

Then, are there any 'sexual hints' in Yang's mobile messages? In the old culture of the Chinese nation having a history of thousands of years, sexual hints have never been unfamiliar to the people having some education and experiences of life. Therefore, there is no need to give any more examples for proof. In fact, both clients of the case know in their hearts without saying anything, having a tacit understanding, so do the court and the readers. It is informed on the network that most of the net citizens considered Yang's messages hinting a sexual deal, but the court will not take it as the basis of judgment. We are all expecting that the civilized, just and open judicial action would give the green light to the analysis of the words in linguistic evidence soon and accept the arrival of it, because it is based on a scientific way.

4 Conclusion and implications

In *The Resolution on the Administration of Judicial Authentication adopted by the Standing Committee of the National People's Congress, PRC* (effective as of 1 October 2005), analysis and attestation of linguistic evidence are not explicitly included in the scope of business of judicial expertise. Correspondingly, there is the absence of analysis and attestation of linguistic evidence of this kind in the judicial procedure. In the world, there have been theories and practice of this field in justice of many countries. Richard Lightfoot, an Australian senior expert witness, who has worked in the field more than 40 years, expressed his point of view on this topic: "Without the support of professional knowledge or special experiences of the experts related, it

is difficult for the average persons to form a strictly logical, precise and reliable judgment upon the issues beyond common sense”.*

Since the analysis and attestation is directed against the specialized knowledge, the Regulations are applicable not only to the disputes over the fact in an ordinary case, but also to the matters within the scope of investigation by court. The common sense possessed by ordinary people does not belong to the scope of “comment evidence” adjusted by the law of evidence. The exception of the program of comment evidence is directed to the “expert evidence”, i.e., “the testimony-comments given by experts having specialized knowledge in related fields on the basis of the specialized training, totally or essentially, ability and insight and experiences can be acceptable.”†

In China, the *Resolutions of the Evidence of Civil Proceedings* have been worked out by the People’s Supreme Court. What has been established by the judicial interpretation is only the system of expert-auxiliary, but not the system of expert-witness in full sense of meaning. The Article 61 of the judicial interpretation stipulates that “the client can apply to the People’s Court for 1-2 experts to appear in the court for illustration of the specialized issues of the case, which can effectively promote the reasonable cognition of the specialized issues in the way of normal logic thinking and the usual experiences of trials by judge, thus, to achieve the soundness of judgment. Although linguistic evidence was not well recognized in this particular case, but just one year after the case, the new Evidence Rules of the People’s Republic of China explicitly include linguistic evidence as one type of admissible evidence before the court.

References

- Cheng, L., & Wang, J. (2008). (in Chinese) Explorations on linguistic evidence. *Theories of Forensic Linguistics*, 2, 71-75.
- Coulthard, M. (2004). Author identification, idiolect and linguistic uniqueness. *Applied Linguistics*, 25(4), 431-447.

* Lecture at the Law School of Renmin University of China *An Expert-witness: assistant to the judge or the mouthpiece of the client?* The translation of the lecture was published in *Prosecution Daily*, 15 May 2007.

† Ibid

- Coulthard, R. M., & Johnson, A. (2007). *An introduction of forensic linguistics: Language in evidence*. London: Routledge.
- Kniffka, H. (2007). *Working in language and law: A German perspective*. Basingstoke: Palgrave Macmillan.
- Shuy, R. (1993). *Language Crimes: The Use and Abuse of Language Evidence in the Courtroom*. Oxford: Blackwell (reprinted in 1996).
- Shuy, R. (2007). *Fighting over words: Language and civil law cases*. Oxford: Oxford University Press.
- Shuy, R. (2010). *The language of defamation cases*. Oxford: Oxford University Press
- Solan, L. (1998). *Linguistic experts as semantic tour guides*. *Forensic Linguistics*, 5, 87-106.
- Wang, J. (1993). (in Chinese) *Forensic linguistics*. Guangzhou: Guangdong Education Press.
- Wu, W. (2002). (in Chinese) *Language and the law: Linguistic research in the legal field*. Shanghai: Shanghai Foreign Language Education Press.
- Hu v. Yang* Beijing Eastern District Court Civil Case Judgment [2006] 7361

Jie Wang, Professor of Law and Professor of Forensic Linguistics, is Director at Research Center for Forensic Linguistics, China University of Political Science and Law and serves on the Advisory Board of National Legislative Committee, the PRC. Her major interest is forensic linguistics and legal lexicography.



Toward a Clarification of the Concept of Cultural Transfer in Legal Translation

Ling Wang and King Kui Sin

It is widely held in translation studies that translating a text is not merely translating its language but also translating the culture embodied in the text and giving the text meaning. When translating the law from English into Chinese in the run-up to 1997 when Hong Kong was to return to Chinese rule, law translators were confronted with the problem of transferring the culture-specific common law into Chinese language. To transfer the legal culture of the law necessitates a clear understanding of the concept of cultural transfer in translation in the first place. This paper examines the antithesis of cultural transfer vs linguistic transcoding in translation theory and in particular, analyzes Snell-Hornby's view on cultural transfer and Catfords' view on transcoding. It focuses on the clarification of the concept of cultural transfer in translation/legal translation.

Keywords: cultural transfer, translation, law, foreignization

1 Introduction

In traditional translation theory, legal texts were regarded as a species of LSP text, and their translation was accordingly treated as a kind of technical translation. In recent translation theory, a change in

perspective has occurred along with the emergence of approaches centered on cultural and communicative factors. The translation of legal texts has increasingly been regarded as a communicative act, no longer a mere operation on the technical linguistic elements to achieve verbal and grammatical parallelism as well as equivalence in legal meaning. Moreover, the translator is no longer considered a passive mediator but rather an intercultural operator, whose choices are increasingly recipient-oriented and based not only on strictly linguistic criteria but also on extra-linguistic considerations—first and foremost the function of the translated text in the target culture.

2 Translation Theory: From Interlingual Translation to Intercultural Translation

Traditionally regarded as a sub-field of linguistics, translation was for a long time treated as an important means of interlingual communication. As Jakobson (1959) put it, “translation proper” was the transposition of a text from one language to another; “interlingual translation” as he called it, “involves two equivalent messages in two different codes”. However, he conceded that there was no full equivalence between code units (1959, p. 233). Jakobson’s view was shared by theorists like Catford and Nida who emphasized transference of meaning across languages and the resultant linguistic equivalence. Fidelity to the original text was considered the most important principle governing translation and the search for best equivalence became its primary goal. Translation studies in this period stressed the textual elements; Catford, for instance, emphasized the correspondence of lexicon and grammar (1965). Nida and Taber classified “formal correspondence” and “dynamic equivalence as two major types of equivalence. “Formal correspondence” is concerned with the message itself and “dynamic equivalence” with the effect (1964, 1982). They acknowledged that there were not always formal equivalents between language pairs. Focusing on the language function and relating linguistic features to the context of both the source and target text, House (1977) set out his notions of semantic equivalence and pragmatic equivalence and proposed that the function of a text be determined by the situational elements of the source text. A more elaborate discussion of the notion

of equivalence can be found in Baker (1992), who examined the notion of equivalence at four different levels in relation to the translation process, i.e. the word level, the grammatical level, the textual level, and the pragmatic level. Taken together, these levels encompass all aspects of translation process.

While characterizing translation as an interlingual rather than a socio-cultural activity, scholars such as Catford and Nida did not lose sight of the role that cultural elements play in the process of translating. Catford drew a distinction between “cultural untranslatability” and “linguistic untranslatability” (1964, pp. 101-03). Nida examined cultural problems in translating (1981). Newmark (1988) in particular examined untranslatable culturally specific items and put them into different categories (p. 95). However, he rejected the “principle of equivalence” underlying Nida’s theory of dynamic equivalence and suggested two approaches to translation, namely, communicative translation, which aims to produce on the target reader effects similar to those on the source reader, and semantic translation, which aims to render “as closely as possible the semantic and syntactic structures of the second language” (1988, pp. 39-41). The former gives priority to the response of the target language reader while the latter foregrounds the meaning of the original. The appropriateness of these two methods depends on the text-type and the purpose of the translation.

The cultural dimension is central to both the polysystem theory of Zohar (1990) and Toury’s (1980) descriptive approach. The polysystem theory treats any semiotic (poly)system (such as language or literature) as a component of a larger (poly)system or culture. Translated literature is therefore a system operating as a part of larger social, cultural and historical systems of the target culture. The correlations between literature and other cultural systems, for instance language, society or ideology, could be seen as a functional relationship within a cultural whole. By employing the notion of norm in his treatment of translation criticism, Toury (1980) pointed us in a new direction for translation studies. As he sees it, translation criticism consists in the study of metatexts produced in a given receiving culture under certain discernible socio-cultural constraints. Translation criticism therefore performs the task of reconstructing such constraints as are operative in a particular translation. It sets out to identify constraints of translation

behaviour, describe the decision-making process the translator has gone through, and formulate hypotheses capable of being tested by further studies. Toury's idea can be said to have inspired the "cultural turn" in translation studies in the 1990s.

It was around this time, too, that translation theory began to undergo a rather radical transformation. Translation was increasingly seen as involving a conscious act of manipulation that moved the author toward the reader and made texts as palatable in the target language and culture as they were in the source language and culture. The ideals of equivalence and faithfulness were now being seriously questioned. The cultural turn in translation studies shifted away from purely linguistic analysis, redefining translation as intercultural communication and focusing on the socio-cultural and ideological dimensions of translating. For Lefevere (1992), translation was essentially rewriting and manipulation. He remarked:

On every level of the translation process, it can be shown that if linguistic considerations enter into conflict with considerations of an ideological and /or poetological nature, the latter tend to win out. (p. 9)

Another cultural theorist, Venuti (1995), who drew a distinction between domestication and foreignization, also insisted that translation must take into account the value-driven nature of the socio-cultural framework within which it is carried out. Culture and cultural elements are no longer seen as impediments to successful linguistic transfer. Rather, culture is an encompassing framework within which effective translation operates. The cultural turn widens the scope of translation by revealing that the translator not only works with the language pair in question, i.e., the source text and the target text, but also with the two cultures, i.e., the source culture and the target culture. Translation is now considered a purposive activity. The outcome or product of translation is understood in a wider context and the factors affecting the translator's decision making process are given special emphasis.

3 The Emergence of Cultural Transfer in Translation Theory

The characterization of translation as cultural transfer is an outcome of the trend mentioned in previous section. According to Vermeer's (1996) skopos theory, translation is a cross-cultural transfer, a form of human interaction determined by its purpose or "skopos". Following Vermeer, Snell-Hornby (1988) denounced linguistic transfer as inadequate, contending that translation should instead be seen as a cross-cultural event. Translation as cultural transfer has become a dominant view resulting from the "cultural turn" in translation theory, and a "shift of emphasis" from "formalist phase" to "broader issues of context, history and convention" (Bassnett, 1998, p. 123). Hatim (2001) also labelled this "influential trend in recent translation studies" as "the cultural model", an approach contrary to the linguistic model which dominated early translation studies in the last century (p. 44). Snell-Hornby (2006) described the "cultural turn of the 1980s" as the trend driven by the theoretical impetus from various sources such as descriptive translation studies, skopos theory and deconstructionism (p. 47).

Snell-Hornby (1988) first employed the term "cross-cultural transfer" in subscribing to Vermeer's view that translation was not the trans-coding of words or sentences between languages, but a "cross-cultural transfer" (p. 46). She argued that in traditional linguistic oriented theory "the text was then seen as a linear sequence of units, and translation was merely a trans-coding process involving the substitution of a sequence of equivalent units" and that the equivalence-centred studies carried out by Jacobson, Nida and Catford were crippled by the very concept of equivalence (pp. 16-19). She contended that the pursuit of equivalence was an incurable illusion based on the false presumption of absolute symmetry between languages, and was thus a distortion of the fundamental problems in translation. Her denunciation of equivalence was best represented by the following remarks:

In this study the view is also taken that equivalence is unsuitable as a basic concept in translation theory: the term *equivalence* (the author's italics), apart from being imprecise and ill-defined (even after a heated debate of over twenty years) presents an illusion of symmetry between languages which

hardly exists beyond the level of vague approximations and which distorts the basic problems of translation. (1988, p. 22)

In explaining the nature of translation, she noted that “language is not seen as an isolated phenomenon suspended in a vacuum but as an integral part of culture” (p. 39). Apart from the definition given by Goodenough and Gohring, Snell-Hornby also subscribed to Vermeer’s concept of culture in translation. She remarked:

This new definition correlates with the concept of culture now prevalent in translation theory, particularly in the writings of Vermeer ... and is the one adopted in this study ... the concept of culture as a totality of knowledge, proficiency and perception is fundamental in our approach to translation. If language is an integral part of culture, the translator needs not only proficiency in two languages, he must also be at home in two cultures. In other words, he must be bilingual and bicultural (cf. Vermeer 1986). (1988, pp. 40, 42)

According to Snell-Hornby, Vermeer was among the first to argue that the linguistic approach was far from adequate for understanding the nature of translation and that translation was first and foremost a cross-cultural transfer. In this regard, Vermeer remarked:

Translation is not the trans-coding of words or sentences from one language to another, but a complex form of action, whereby someone provides information on a text (source language material) in a new situation and under changed functional, cultural and linguistic conditions, preserving formal aspects as closely as possible. (Snell-Hornby, 1990, p. 82)

Rather than giving emphasis to the equivalence of linguistic units such as words or sentences, Vermeer began to view translation as a complicated action in a broader socio-cultural context. In his skopos theory, translation is a form of human interaction determined by its “skopos” or purpose. Following in the footsteps of Vermeer, Snell-Hornby took a cultural approach, abandoning linguistic equivalence as the goal of translation. She held that the translator’s cultural knowledge, proficiency and perception underpinned not only his ability to “produce

the target text, but also his understanding of the source text” (p. 42). In other words, understanding of the cultural elements of both the SL and TL was a pre-requisite in translation. However, she did not explain how translation could take place between cultures without taking linguistic equivalence into consideration.

The notion of cultural transfer has been given different and even conflicting interpretations in the literature and the range of empirical facts judged to be relevant to the study of cultural transfer varies from theory to theory. In addition, any study of translation must deal with the language pair in question, and translation is always a verbal representation of the source text.

4 Clarification of the Notion of Cultural Transfer

4.1 *Cultural Transfer vs Transcoding*

Despite years of debate, translation scholars are still wrestling over whether a translation should be literal or free. In traditional theory, literal translation has been characterized as a word-for-word transmission of a text from one language into another. The adequacy of translation has traditionally been judged on the basis of the degree of lexical and grammatical correspondence between the source and target languages. Such correspondence is often defined in terms of equivalence. Thus fidelity to the original text is considered the most important principle of translation and the main task of the translator is to find the best equivalence. On the other hand, free translation has been characterized as a sense-for-sense transmission not constrained by the lexicon or grammar, thus giving the translator absolute freedom as to how to render the source text in the target language. Challenging the rigid dichotomy of word and sense, Snell-Hornby (1988) contended that it was rooted in the “illusion of equivalence” (p. 13), and, as we have already noted, advocated the notion of cultural transfer as a complete break with the traditional theory. She pointed out that this new orientation had in fact already been put forward by several German scholars in the 1980s. She said:

What is dominant in the three new basic approaches recently presented in Germany ... is the orientation towards cultural rather than linguistic transfer; secondly, they view translation,

not as a process of transcoding, but as an act of communication; thirdly, they are all oriented towards the function of the target text (prospective translation) rather than prescriptions of the source text (retrospective translation); fourthly, they view the text as an integral part of the world and not as an isolated specimen of language. These basic similarities are so striking that it is not exaggerated to talk of a new orientation in translation theory. (pp. 43-44)

Adopting Vermeer's view that translation is a "cross-cultural event", Snell-Hornby argued that translation was not simply as "a matter of language" but a "cross-cultural transfer" (p. 46). As has been noted, Vermeer (1996), in his endeavour to establish skopos theory, held that translation was not the trans-coding of words or sentences from one language to another, but a complex form of action. Skopos theory is basically a functional theory and "its concern is the potential functionality of a target-text (translation/translatum) under target-culture ('recipients') conditions" (1996, p. 31). Vermeer emphasized that the target culture constrained the choices available to the translator, urging her to pay special heed to the convention of the target culture and the expectations of the target reader which in turn pre-determine the function of the translation. In refuting the concept of equivalence, he contended:

It is not the source-text equivalence (or, more loosely, correspondence) requirement which guides the translation procedure but the skopos, e.g. to show target-text recipients how a source-text is/was structured". (1996, p. 51)

One of the main factors in the skopos of a communicative activity is "the (intended) receiver or addressee with their specific communicative needs" (1996, p. 46). He claimed that skopos theory applied to all translations and the function of the translation in the target text could differ from that of the source text. The same text could therefore be translated in different ways depending on its function and the translator's main task was to produce a new text that satisfies the cultural expectations of target receivers.

As Vermeer's and Snell-Hornby's proposed new orientation was intended as a revolt against the prevailing linguistic approach, we now need to look back at the major tenets of this earlier turn.

Catford is generally acknowledged to be the founder of the linguistic school in translation theory. In defining translation as "the replacement of textual material in one language (SL) by equivalent textual material in another language (TL)" (1965, p. 20), Catford presupposed the existence of linguistic equivalence between SL and TL. For him, textual material was not "the entirety of a SL text", but mainly the "grammar and lexis" (p. 20). He further made a linguistic breakdown of SL and TL into what he called "extent", "levels" and "ranks", employing equivalence as a key concept throughout (p. 21). He said:

The central problem of translation practice is that of finding TL translation equivalents. A central task of translation theory is that of defining the nature and conditions of translation equivalence. (p. 21)

Thus, in Catford's view, the central problem and task of translation centre around the concept of equivalence. He further distinguished between "textual equivalence" and "formal correspondence", two basic translation equivalences in his theory (p. 27). Equivalent units in the TL vary in size from the entire text to any portion of the text, having a wider scope than formal correspondence. In his view, textual equivalence is represented by the occurrence of a TL textual equivalent for a specific SL item, allowing equivalence-probabilities to be established between the two (p. 30).

Thus for Catford, establishing equivalence-probabilities is an ideal goal of translation, as these allow translation to be carried out in a manner similar to mathematics.

On the other hand, formal correspondence, as Catford pointed out, is best exemplified by translation between two languages both of which operate with "grammatical units at (all) five ranks" (for example, English and French). While formal correspondence is harder to achieve as it requires the nearest match between TL and SL grammatical categories and can only be fulfilled through textual equivalence, Catford maintained that the former is still "an essential basis for the discussion of problems which are important to translation theory and

necessary for its application” in translation practice (pp. 32-33). Observing that there are always “some departures from the formal correspondence”, what he called “shifts”, he conceded that formal correspondence can only be approximate in nature. He further distinguished between two major types of “shifts”: level shifts and category shifts. In general terms, they are linguistic units in SL which have TL equivalents belonging to a different linguistic level or category (1965, p. 73). Thus Catford was well aware that “translation equivalence does not entirely match formal correspondence.” That is why he resorted to textual equivalence (p. 82). He was also aware that even textual equivalence is not always achievable because of two kinds of un-translatability, linguistic and cultural. Linguistic un-translatability occurs when there is no lexical or syntactical substitute in the TL for an SL item, whereas cultural un-translatability is due to the absence in the TL culture of a relevant situational feature for the SL text.

We are now in a better position to assess Snell-Hornby’s critique of Catford’s linguistic theory of translation. Her main criticism centres around the foundation of his linguistic approach, which seems to her shaky.

Catford bases his approach on isolated and even absurdly simplistic sentences of the type propagated in theory of transformational grammar as well as on isolated words; from such examples he derives “translation rules” which fall far short of the complex problems presented by real-life translation. (1988, p. 20)

Anyone who has read Catford carefully can see that this criticism is totally unfounded. According to Catford, translation textual equivalents are discovered by two methods, namely, by consulting the linguistic intuition of competent bilingual informants or translators, or through a formal procedure of commutation and observation of concomitant variation, the latter being “the ultimate test” (1965, pp. 27-28). But Snell-Hornby completely, and *conveniently*, ignores the second method, directing her attack solely on the first:

Anyone with experience in translation knows all too well, the opinions of the most competent translators can diverge

considerably, and the ... [first method] is—for a rigorously scientific discipline—hopelessly inadequate. (1988, p.20)

This criticism fails to do justice to Catford. He made it very clear that consulting the linguistic intuition of competent bilingual informants or translators works only for simple cases, but that for complicated cases, the formal procedure may be used (p. 28). To illustrate this point, let us adapt Catford's examples. Suppose we have the following sentence pair:

1a. 我的兒子六歲.

1b. My son is six.

If we change “兒子” of 1a to “女兒” to obtain

1c. My daughter is six.

then the changed portion of 1b, namely “daughter”, can be taken to be the equivalent of the changed portion of 1a, namely “女兒”, i.e., “daughter” = “女兒”. The method applies not only to lexical words, but also to structural words. Consider the following sentence pair:

2a. 地上有黃金.

2b. There is gold on the ground.

If we change “上” in 2a to “下” to obtain

2c. There is gold under the ground.

likewise, the changed portion of 2b, namely “under”, can be taken as the equivalent of the changed portion of 2a, namely “下”, i.e., “under” = “下”.

Of course, the procedure is not always so straightforward. Finding a translation equivalent may involve the very complicated procedure of comparing a great number of sentence pairs. However complicated, it can nonetheless be carried out rigorously and each of its findings subjected to very strict tests.

What is most noteworthy about Catford's second method is that it is an empirical and probabilistic one. Translation equivalence is “an empirical phenomenon, discovered by comparing SL and TL texts” (p. 27). Well aware of the fact that equivalence between an SL item and a TL item is not always a one-to-one correspondence, Catford assigned a

probability value to each equivalent pair, ranging from 0 (zero equivalent) to 1 (one-to-one). The following is Catford's own example:

[I]n a French short story of about 12,000 words the preposition *dans* occurs 134 times. The textual equivalent of this in an English translation is *in* in 98 occurrences, *into* in 26, *from* in 2, and *about* and *inside* in one occurrence each; there are six occurrences of *dans* where the equivalent is either nil, or not an English preposition. ... In terms of probabilities we can state the translation equivalences as follows: *dans* = *in* .73, *dans* = *into* .19, *dans* = *from* .015, *dans* = *about/inside* .0075. This means that if you select any occurrence of *dans* at random in this text, the probability that its translation equivalent on that occasion is *in* is .73, the probability that it is *into* is .19, etc. (1965, p. 30)

Catford further distinguished between two types of probability value, namely, unconditioned probabilities and conditioned probabilities, the latter being values affected by contextual and co-textual factors (pp. 31-32). He went on to make the following remark:

Provided the sample is big enough, translation-equivalence-probabilities may be generalized to form 'translation rules' applicable to other texts, and perhaps to the 'language as a whole'—or, more strictly, to all texts within the same *variety* of the language. (p. 31)

Thus, nothing is further from the truth than accusing Catford of deriving translation rules from "absurdly simplistic sentences", as alleged by Snell-Hornby. Quite on the contrary, for Catford, they are derived from a *big enough* sample— a big enough corpus in contemporary linguistic terminology. More crucially, his approach is in all important respects the same as the corpus-based approach in translation studies today, which aims to extract translation rules from a huge parallel corpus of translated texts. Catford can thus properly be said to be the pioneer of the corpus-based approach in translation studies.

Three further points must be made about Catford's linguistic approach, particularly since it has been so unfairly and widely criticized,

even to the extent of making it something of a dead horse in translation studies today.

First, Catford's linguistic approach is by no means built on the "illusion of equivalence". For he expressly states that "the SL and TL items rarely have 'the same meaning' in the linguistic sense" (p. 49), "since every language is formally *sui generis* and formal correspondence is, at best, a rough approximation" (p. 36). Translation equivalence is therefore not based on sameness in meaning, but on functional interchangeability in the same context (p. 49). Put briefly, a TL sentence T is a translation equivalent of an SL sentence S if T and S have overlapping meanings relevant to the context in question (pp. 37-39), such that T "can function in the same situation" as S (p. 49). Accordingly, the aim of translation is, Catford argued, to select TL equivalents "not with the same meaning as the SL items, but with the greatest possible overlap of situational range" (p. 49). Catford's "translation equivalent" looks very much the same as Nida's "closest natural equivalent", but it differs from the latter in one crucial aspect, in that it is invariably context-dependent, whereas the latter can be context-free.

Another equally important point about Catford's linguistic approach can best be seen from the following passages:

...[A] manifestation of the 'same meaning' or 'meaning-transference' fallacy is seen in the view that translation is a 'transcoding' process, a well-known example being Weaver's remark: 'When I look at an article in Russian, I say: "This is really written in English, but it has been coded in some strange symbols. I will now proceed to decode".'

This implies either that there is a one-to-one relationship between English and Russian grammatical/lexical items and their contextual meanings, or that there is some pre-existent 'message' with an independent meaning of its own which can be presented or expounded now in one 'code' (Russian) now in another 'code' (English). But this is to ignore the fact that each 'code' (i.e. each language carries with it its own particular meaning, since meaning ... is 'a property of language'....

...

Our objection to ‘transcoding’ or ‘transference of meaning’ is not a mere terminological quibble. There are two reasons why translation theory cannot operate with the ‘transference of meaning’ idea. In the first place, it is a misrepresentation of the process, and consequently renders the discussion of the conditions of translation equivalence difficult; in the second place, it conceals the fact that a useful distinction can be made between *translation* and another process which we call *transference*. In transference ... there is, indeed, transference of meaning, but this is not translation in the usual sense. (pp. 41-42)

Meaning does not get transferred in translation, and translation is not a process of transcoding. This comes out loud and clear in Catford. Translation for him is not a process of code-switching according to rigid, mechanical rules based on one-to-one formal correspondence between SL and TL items, as Nord has alleged (1997, p. 7); nor is it a process of transcoding of pre-existent naked meaning. So the Catford that Snell-Hornby and many others have attacked turns out to be not merely a straw man, but, ironically, also a comrade in arms.

A third important point to note about Catford’s linguistic approach is that it is by no means incompatible with the so-called cultural approach. As has been shown, Catford’s approach is an empirical and probabilistic one. Its aim is twofold: first, to find TL equivalents (in his sense) by way of comparing actual samples of SL and TL texts, with the resultant TL equivalents serving as translation rules; and second, to set out the conditions for justifying TL equivalence. Unlike Snell-Hornby and many other theorists, Catford never told us *how to translate*. So in this sense his linguistic approach can be said to be *theory-free*. He only told us *how to find* translation equivalents, which is exactly what corpus linguists do nowadays. A corpus might contain TL texts produced in the light of different or even conflicting theories, but Catford’s approach would still be applicable. Accordingly, the cultural approach advocated by Snell-Hornby and others of a similar persuasion is not really a rival approach, and hence there is not much sense in talking about an emancipation from the linguistic theory of translation that Catford represents.

4.2 Vermeer's View of Translation as Cross-cultural Transfer The tenets of the cultural school as represented by Vermeer and Snell-Hornby can be reduced to three statements:

1. Translation is not simply a matter of language and it does not take place merely between languages;
2. Language is an integral part of culture and hence translation from one language to another is a cross-cultural transfer; and
3. The source text in itself does not dictate how it is to be translated; what dictates the translation is the specific purpose in question.

This counters the lay view of translation, described well enough by Snell-Hornby as follows:

... translation is simply a matter of words, or individual linguistic signs, which are replaced by equivalent words, signs or units in the target language. The translator, so it is assumed, therefore needs either simply a good command of the vocabulary in both languages involved, or a good dictionary. (1992, p. 2)

Such a naive, static, and mechanical view is, as Snell-Hornby endeavoured to show, rooted in the false belief in the existence of equivalence between languages, i.e., a one-to-one correspondence between SL and TL items. Yet her critique of such a notion was directed not so much against lay people as against Catford and other descriptivists, such as Toury and Koller. But it is really hard to see how such a view of translation could be attributed to Catford, who expressly dismissed it as fallacious. We do not want to labour this point, but let us just say this. Vermeer and Snell-Hornby's vehement opposition to the linguistic approach is totally misguided. In place of the false dichotomy of word vs sense, they have ushered in the false dichotomy of transcoding vs cultural transfer. As has already been shown by Catford, there is no such a thing as transcoding. What, then, is cultural transfer?

Vermeer answered the question with a metaphor:

What does it mean to translate? ... Suppose you take a tree from a tropical climate to a temperate zone. Will it not need special

care? Will it not be considered something out of the ordinary by whoever sees it? It will never be the same as before, neither in growth or in the eyes of its observers. ... With a translation it is not much different. One will have to decide before translating whether it is to be “adapted” (to a certain extent), i.e., “assimilated,” to target culture conditions, or whether it is meant to display and perhaps even stress its “foreign” aspect ... One will have to make a choice. In both cases the text will be “different” from what it was in its “normal” source-culture conditions, and its “effect” will be different. Assimilation does *not* necessarily mean making a text look like an ordinary target-culture text(eme), i.e. making it look “as though it were not translation”. Assimilation need not take place on the “surface” level alone; paradoxically enough, assimilation on other levels can lead to an “alienation” (*Verfremdung*) on the surface level. (1995, p. 39)

Translation is likened to the transplant of a tree onto foreign soil for a specific purpose. The translated text (the transplanted tree) has been adapted or assimilated to a culture (foreign soil) different from the original (home soil). One important point to note here is: assimilation can take place on different levels; the target text is not necessarily a completely domesticated text—it may indeed turn out to be *alien* to the target culture. This is a point which has been overlooked or suppressed by Vermeer’s followers, who have identified Vermeer’s functional approach with domestication. Since the notion of *skopos* is an all-embracing one, it is in principle able to accommodate all kinds of approach to translation.

... *skopos* theory ... allows for transferring (or demands the transfer of)* as many features of the source-text surface-structure as possible into target culture surface-structure features in such a way that target-culture addressees can appreciate the literariness of the translation in a way comparable/similar/corresponding to source-culture addressees who are able to appreciate their source-text ... (1995, p. 50)

* [Note in the original: The term “transfer” is not strictly applicable. Nothing is physically transferred.]

The passage is worth noting in two important respects. The original footnote clearly shows that Vermeer was not comfortable with the word “transfer”. It would be interesting to see what word he would or could have used in its place. “Transcoding” would have definitely been ruled out as by it he meant translation which takes place merely between languages guided by the principle of equivalence. This is not a trivial observation. For “translation as cultural transfer” was used by him to mark a new orientation in translation studies. So it is legitimate to press the question of what he meant by “cultural transfer”. The tree transplanting metaphor cited above suggests that in translation a text is transferred from one culture to another, with the two cultures in question remaining unchanged. This is in line with the definition Vermeer gave in his seminal paper entitled “Translation as a cultural transfer” (1986). However, the passage just cited implies that transcoding, in the sense that purely linguistic features of the source text are “carried over to” or reproduced in the target text, can be one possible purpose of translation. This seems to defeat the whole purpose of skopos theory, which asserts that “translation is not the transcoding of words or sentences from one language to another” (1986, p. 33). A closer look at his remarks on the “equivalence postulate” of Toury’s theory will reveal something even more devastating for skopos theory, however:

... there is a methodological difference between Toury’s approach and that of skopos theory. According to the latter, a ‘transfer’ (by any strategy) of a great number of source-text phenomena to a target-text still depends on the skopos (purpose) of translating. It is not the source-text equivalence (or, more loosely, correspondence) requirement which guides the translation procedure but the skopos, e.g. to show target-text recipients how a source-text is/was structured (or for some other purpose ...) The skopos is hierarchically higher than the equivalence postulate. Such a procedure is then not retrospective (as is the case when taking the source-text structure as the highest element in the hierarchy), but prospective in the sense that the skopos demands a full consideration of source-text structures for a given purpose. In such a case, the difference between Toury’s approach and that

of skopos theory is one of focus; *in practice, the result may look much the same* (Ibid. p. 51. *Italics mine*).

The passage clearly shows that Vermeer was in fact not really against the equivalence postulate or transcoding, as he expressly stated that the difference between Toury's approach and his is "one of focus", i.e., Toury's focus is on the source-text (retrospective), whereas his is on the target-text (prospective); and that both approaches may lead to much the same target text. We can thus see that the kind of transcoding he deplored was in the final analysis *transcoding without a purpose*, whereas he saw *transcoding with a purpose* as both possible and legitimate. His opposition to the linguistic approach turns out to have been overstated.

The fundamental principle of skopos theory, according to Vermeer, is that it "strictly regards translating from the point of view of a text functioning in a target-culture for target-culture addresses" (1990, p. 50). Translation as cultural transfer is therefore translating a text from one culture to another according to a specific function. What is transferred (understood in a figurative sense) is the text, not the culture of the text. But here Vermeer simply failed to see there are situations where "cultural transfer" means "the transfer *of* one culture *to* another", and legislative translation is a typical case of cultural transfer in this sense.

4.3 Snell-Hornby's View of Translation as Cultural Transfer

In line with the central arguments of the new theoretical orientation, which I have just discussed, Snell-Hornby held that translation was a cultural transfer rather than a linguistic transfer and that translation as a cultural transfer was oriented towards the function of the target culture and also facilitated cross-cultural communication. To illustrate this point, Snell-Hornby (1998, pp. 94-5) cited her own experience in India. When walking along the streets of Southern India about twenty years earlier, she was repeatedly approached by local people who asked her a question in their native language which literally means "Where are you going?" in English. She was obviously puzzled by this strange question. Later she found out that it was a local form of greeting when people met in the street. A mere transcoding would yield "Where are you

going?” which, in her view, was problematic, because it was likely to cause a communication break-down. She pointed out how this showed the limitations of mere transcoding by neglecting the twin facts that language was dependent on cultural and social norms and that translation was essentially a cross-cultural event. Instead, an appropriate translation would be “How are you?” as it complied with the conventions of greeting in English, and thus effected a cultural transfer.

The starting point of Snell-Hornby's framework is reasonable in the sense that the pursuit of absolute equivalence or symmetry between languages is futile and it is doubtless the case that cultural elements must be taken into account when doing translation. If her thoughts on the incident lead her merely to the above conclusion, her argument about the cultural account in translation would be sound. However, in analyzing the appropriate translation for the Indian way of greeting, she distinguished two translation methods: one is the mere transcoding and the other is what she called “cultural transfer”. In her view, linguistic transcoding and cultural transfer are apparently two distinct methods of translation. Linguistic transcoding is reduced to linguistic transference without any cultural account. By contrast, cultural transfer indicates the rendering of source text smoothly and idiomatically such that the English speaking reader would perceive the translation as conventional and familiar. Thus the important units of translation are seen as products of culture that emerges from their distinctive social settings instead of strings of words or sentences or even whole texts. According to Snell-Hornby, translation should be oriented towards the function of the target text rather than submit to the prescription of the source text. She remarked:

The text cannot be considered as a static specimen of language (an idea still dominant in practical translation classes), but essentially as the verbalized expression of an author's intention as understood by the translator as reader, who then recreates this whole for another readership in another culture. This dynamic process explains why ... the perfect translation does not exist (1988, pp. 1-2).

We shall see from the above that in proposing the translator “recreates this whole for another readership in another culture”, Snell-Hornby holds that translation as “cultural transfer” should conform to the cultural norms of the target language and familiarize the source culture to the extent that target readers could identify it with their own culture. As has been shown, the term “cultural transfer” is used by Snell-Hornby as the antithesis to “linguistic transcoding”. It is clear what she means by “linguistic transcoding”: a naïve, simplistic, static, and mechanical manner of translation which consists in matching SL and TL words solely by relying on a bilingual dictionary, a view of translation rooted in the false belief in the existence of equivalence (a one-to-one correspondence) between languages. However, it is by no means so clear what she means by “cultural transfer”, particularly what she means by “transfer”, i.e., what gets transferred in translation.

She regularly stresses two points in her work. First, language is an integral part of culture and also of the world. Understanding a text requires an understanding of its socio-cultural context, and this applies to both the source text and the target text. Second, translation is an act of communication oriented towards the function of the target text, not a mere linguistic operation prescribed by the source text. These two points seem clear enough, but again, what gets transferred in translation is not at all clear.

Her discussion of the translation approach of Hans G. Hönl and Paul Kussmaul (in Snell-Hornby 1988, pp. 45-46; 1990 pp. 83-84), which she endorsed, gives us some idea of what she means.

Hönl and Kussmaul’s starting point is the conception of the text as what they call ‘the verbalized part of a socio-culture (1982: 58); the text is imbedded in a given situation, which is itself conditioned by its sociocultural background. The translation is then dependent on its function as a text ‘implanted’ in the target culture. The basic criterion for assessing the quality of a translation is called the ‘necessary grade of differentiation’, which represents ‘the point of intersection between target text function and socio-cultural determinants’. (1982: 53)

To illustrate this they quote two sentences, each naming a famous British public school:

In Parliament he fought for equality, but *he sent his son to Winchester*.
 When his father died *his mother couldn't afford to send him to Eton any more*.

They then quote two extreme types of German translation:

...seinen eigenen Sohn schickte er auf die Schule in Winchester.
 ...konnte es sich seine Mutter nicht mehr leisten, ihn nach Eton zu schicken, jene teure englische Privatschule, aus deren Absolventen auch heute noch ein Grossteil des politischen und wirtschaftlichen Führungsnachwuchses hervorgeht. (Snell-Hornby's translation: "...that expensive English public school which even today produces many of the future leaders in politics and management".)

The first translation is under-differentiated: the mere name "Winchester" does not carry the same meaning for a German reader as for an English one. The second is over-differentiated: however correct the information on British public schools may be, it is superfluous to the text concerned. In the first of the two sentences, it is the double-faced hypocrisy of the father (hence the exclusive, elitist character of public schools) that is stressed, while the second focuses on an impoverished widowed mother (and the expensive school fees). As the necessary grade of differentiation for the texts in question, the authors therefore suggest:

Im Parlament kämpfte er für die Chancengleichheit, aber seinen eigenen Sohn schickte er *auf eine der englischen Elisteschulen [elite schools]*.

Als sein Vater starb, konnte seine Mutter es sich nicht mehr leisten, ihn auf *eine der teuren Privatschulen [private schools]* zu schicken. (1990, pp. 83-84)

Here Snell-Hornby agrees with Hönig and Kussmaul's approach, which rejects the orthodox demand to preserve as much of the original as possible so as to achieve equivalence in translation. Preserving "Winchester" in the German translation is an under-translation, because for German readers the name "Winchester" would just be the name of a city, perhaps even unable to call up the notion of there being a school

there, let alone Winchester College, the oldest public school in England. On the other hand, filling in too much background information is an over-translation, distracting readers from the impoverished condition of the widowed mother. The suggested translations, in which “Winchester” is translated as “one of the elite schools and “Eton” as “one of the expensive private schools”, give as much information as necessary for the functions of the two English sentences to allow German readers to understand the socio-cultural meaning of “Winchester” and “Eton”. So we are not translating “words”, but “words-in-text” (1988, p. 45). What gets transferred in translation should be the socio-cultural meaning of words, not their surface meaning of words.

In a paper entitled “Translation as a Cultural Shock: Diagnosis and Therapy” (1992), Snell-Hornby describes how erroneous, mechanical matching of equivalents in translation can give rise to interlingual miscommunication and cultural shock. An amusing example reads:

Nice German business man, 36, wants to become a black woman. Every letter will be answered. (p. 2)

The shock, obviously unintended, is due to matching the German “bekommen” (= get/find) to the English “become”. Examples like this abound.

On the syntactic level, following the conventions of the source text would give rise to stiltedness in the target text. Very often, equivalent syntactic forms are not acceptable in the target language (1990, pp. 6-7). The following are English translations of a hotel advertisement in German. The one on the left is the original translation, which stays close to German syntax, and the one on the right is a rewriting according to English advertising conventions.

To enjoy Vienna’s unique atmosphere.

In one of the city’s guesthouses.

Come and enjoy
the unique
atmosphere
of Vienna—and
stay in one of
the city’s finest
Pensionen.

University. City hall, Parliament,
Burgtheatre and Vortivkirche

A few minutes'
walk from the
University,
City Hall,
Burgtheatre and
Vortivkirche.

In the immediate vicinity.

...

...

The upshot of her discussion is this: “Translation is not a merely a matter of language, but primarily one of knowledge, of which language forms only a part” (p. 7). And translation should free itself from the inexorable grip of words and avoid inflicting cultural shocks by conforming to the linguistic and cultural norms of the target language. Let us return for a moment to the questions arising from the two approaches to translating the Indian greeting examined by Snell-Hornby, namely linguistic transcoding and cultural transfer. For her, the way to effect cultural transfer is to match the original Indian greetings to an idiomatic expression in English. In this way, the translation actually functions the same way as the original does but may fail to preserve the original patterns and to reflect the real meaning expressed in the original text. In other words, the cultural transfer that Snell-Hornby advocates involves conformity with the conventions of the target culture. In addition, Snell-Hornby only recognizes the importance of the source culture in the understanding of source text. Instead, she places great emphasis on the target culture since she holds that the translator should be oriented towards the target culture, producing translation that is representative of the culture of target language instead of the culture of the source language. Evidently, translation as cultural transfer in this sense involves inadequate transference of the source culture. Cultural transfer is in the final analysis “communication across cultures” (p. 7), very similar to what Newmark called “communicative translation”.

4.4 Domestication vs Foreignization

In maintaining translation as cultural transfer, Snell-Hornby is in fact adopting a target-culture-oriented position. For her, the source culture is important only for understanding the source text, but the target culture in fact plays a far more vital role since it shapes the target text, which is what actually facilitates cross-cultural communication. Thus viewed, translation as cultural transfer is in effect cross-linguistic communication at the cultural level, a mapping of the source culture onto the target culture, in other words, a functional assimilation of the source culture into the target culture.

As is well known, such an approach is contrary to the one advocated by Schleiermacher. For him, there are only two options for the “true” translator: Either to move the reader towards the writer or to move the author towards the writer (Robinson, 1997, p. 229). He opted for the first, remarking:

To achieve this, the translator must adopt an ‘alienating’ (as opposed to ‘naturalizing’) method of translation, orienting himself or herself by the language and content of the ST. He or she must valorize the foreign and transfer that into the TL. (quoted in Munday, 2001, p. 28)

Adopting Schliermacher’s categorization of these two translation strategies, namely “alienating” and “naturalizing”, Venuti (1992) argues that the former strategy could exert a positive influence on the target culture, while the latter might inhibit innovation on the part of the target language and culture. Having examined past examples of the decisive role of domestication in forming certain foreign cultural identities in the target culture, he had come to realize that translators had tended to achieve the goal of communication by naturalizing foreign texts in order to conform to domestic conventions. However, the domestication of a foreign culture could result in misrepresentations of that culture. Worse still, it could paralyze the ability and willingness of the target reader to accepting new elements from a foreign culture. Venuti came to the conclusion that although translation is bound to be domestication to some degree, foreignization “promises a greater openness to cultural differences” (p. 23). Like Schliermacher, he subscribed to foreignization, which he believed was the proper way to effect the transfer of the source culture as it allowed the target language

to be influenced and amplified by the source language and open the way to novelty and innovation in the target language. Thus translation as “cultural transfer” leaves a choice open to each individual translator: Either she chooses foreignization, preserving the alien elements in the target text, or she chooses domestication, ironing these out to make the target text readily comprehensible to the reader. The choice in practice depends on the particular *skopos* that the translator intends.

It is crucially important to understand the opposed notions of “domestication” and “foreignization” very clearly if we wish to understand precisely what is involved in effecting cultural transfer. In an attempt to define translation strategy, Kwiecinski (2001) provided a rather comprehensive definition: “... translation strategy ... may be defined...as a textually manifest, norm-governed, intersubjectively verifiable global choice of the degree in which to subscribe to source-culture or target-culture concepts, norms and convention.” (p. 120) Despite the complicated modification of the word “choice”, one thing we could see clearly is that translation strategy always involves a choice in relation to culture-specific elements. Whether a translation exhibits domestication or foreignization can only be determined where the context reveals cultural asymmetry and is examined as such. In other words, it is only when directly confronted with the problem of translating a culture-specific item that the translator has to make a choice between the two strategies. A common misunderstanding is that the translator is always engaged in make such a choice even when translating items that are not culture-specific. Consider the translation of the two English terms “Internet” and “Sars” into Chinese. For each term we can have at least two translations, *yinte wang* (英特網) and *hulian wang* (互聯網) for “Internet”, *shashi* (沙士) and *fei dianxing xing feiyan* (非典型肺炎) for “Sars”. It is interesting to note that the linguistic formation of the translated terms *yinte wang* (英特網) and *shashi* (沙士) may seem “foreign” to the Chinese reader and hence are considered as “foreignized” terms. However, both “Internet” and “Sars” are terms which represent non-culture-specific concepts. “*yinte wang* (英特網) and *shashi* (沙士) differ from *hulian wang* (互聯網) and *fei dianxing xing feiyan* (非典型肺炎) only in that they are transliterations rather than semantic translations, a difference solely in translation

technique. The question of whether this is foreignization simply does not arise here. Likewise, *hulian wang* (互聯網) and *fei dianxing xing feiyan* (非典型肺炎), though readily comprehensible in their linguistic form, are not cases of domestication, because no *foreign* culture is involved here. Put differently, whether a translation is a case of domestication or foreignization cannot be determined by the naturalness or foreignness of its linguistic form alone.

So what do we actually do as translators when we come across culture-specific items? If we choose to domesticate, we just need to *find* an item in the target language as a linguistic substitute, leaving the target language *as it is*. For example, translating the English idiom “there is no smoke without fire” into *wufeng buqi lang* (無風不起浪) (no waves without wind), actually replaces the English idiom with a similar one in Chinese; both mean that there must be a reason for the result. No linguistic and conceptual adjustment on the part of the target language is required. Any peculiarity in this way of expressing causality in English is no longer discernible in the translation, i.e., the cultural meaning of the source language has been domesticated or naturalized.

In contrast, to foreignize means to import the source culture into the target culture. This can be achieved in two ways. One is to foreignize at both the linguistic and conceptual levels, i.e., calling on the target language to make both linguistic and conceptual adjustments. Take the example of the English translation of the Chinese term *li* (禮), one of the key concepts in Confucianism. When it is translated as *li* (禮), using the technique of transliteration (direct borrowing), it evidently introduces to the target reader a new linguistic form. Adjustment also needs to be made on the conceptual level so that the English reader can understand the cultural meaning of the coined English term *li* in the light of Confucianism. The other way is to foreignize only at the conceptual level, i.e. without involving any linguistic adjustment. In the same example, when *li* (禮) is translated as “morality”, “propriety” or “ritual”, the translator uses an existing English word as its equivalent. However, when the translator makes it clear to the English reader that “morality”, “propriety” or “ritual” should not be understood in their usual senses in English but should be

re-defined and understood with reference to Confucianism, an intention to foreignize is revealed. We can see that in either case conceptual adjustment is a must while linguistic adjustment is not really essential. However, there are, as will be shown, cases when where a particular linguistic structure in the source text may embody the culture of the source language. In such cases, the translator has to preserve the linguistic features of the source text and linguistic and conceptual adjustments of the target language are required. In a nutshell, cultural transfer as foreignization requires the translator to import the culture-specific elements into the target culture regardless of whether the foreignness is reflected in the linguistic form of their translations.

5. Reconstruction of the concept of Cultural Transfer in Legal Translation

It is now clear that “cultural transfer”, when employed to characterize translation as a socio-cultural activity rather than a mere act of linguistic recoding, has in fact been understood in two diametrically opposite senses. On the one hand, it has been taken to mean the mapping of the cultural elements of the source text onto their functional equivalents in the culture of the target text, an approach which aims to facilitate cross-cultural communication without making any linguistic or conceptual adjustment on the part of the target text by way of domestication. On the other hand, the term “cultural transfer” has also been taken to mean the importation of the source culture into the target culture, an approach which requires linguistic and conceptual adjustments on the part of the target language.

When Hong Kong became a British colony in 1842, the British brought along a whole lot of “culture-specific” things, tangible and intangible, of which the common law was one. With a clarified notion of cultural transfer in translation, it is sufficiently grounded to further clarify the notion of cultural transfer in legal translation. Legal translation in Hong Kong is just a case in point. First, the transplant was not from one jurisdiction to another—it was carried out within the same common law jurisdiction as Hong Kong became a common law jurisdiction the moment the British flag was hoisted (or legally, even earlier). Second, for nearly a century and a half, the law was in the

same language as its home state, namely, English. Third, the law was administered and practised by professionals from its home state, or from other common law jurisdictions, or from the local community who spoke and were trained in the same language of the law. In a word, except for some adaptations in areas such as marriage and succession, the common law was transplanted to Hong Kong *en bloc*. Thus, the legal culture, however estranged it was from the majority of citizens who were Chinese-speaking, was unmistakably a common law culture.

The translation of the common law into Chinese was therefore by no means carried out in an alien culture from the outset. Rather it was carried out in the transplanted culture of the common law. There was no sharp distinction between source and target cultures in the first place.

Under the bilingual legislation system of Hong Kong, the English text and its Chinese counterpart must fulfill two conditions. First, they must have equal legal status. Second, they must convey the same legal meaning. The first condition must be, and was in fact, met by legislative measures. However, how the second condition can be met is still not clear to many translation scholars and practising law translators. Some, like Snell-Hornby, have contended that equivalence in meaning is a chimera, an illusion, or an unattainable goal. Thinking along the line of Vermeer's *skopos* theory, we have a definitive purpose here: whatever we do, and however we do it, the Chinese text must convey the same legal meaning as the English text; in other words, the two texts must be equivalent in legal meaning. If equivalence were indeed an illusion, then no multilingual legal system would be viable.

Legal translation is certainly among the varieties of translations where the translator is subject to stringent semantic constraints at all levels due to the peculiar features of the language of English law on the one hand and the culturally mediated nature of legal discourse on the other. To maintain the authenticity of the law, the cultural concepts which are specific to the original legal system could not be replaced by functionally equivalent concepts of the Chinese language. Thus cultural transfer by way of domestication is not appropriate in legal translation. The authoritative status of legislation dictates that the goal of legislative translation is to reproduce a legal text in the target language which conveys the same legal meaning as the source text. It requires the legal translator to adjust the target language in such a way that the

legal meaning of the source text could be expressed by the target language. Cultural transfer as foreignization is thus best exemplified in the translation of a particular legal system from one language to another.

References

- Baker, Mona. (1992). *In other words: A coursebook on translation*. London: Routledge.
- Bassnett, S. (1998). The Translation Turn in Cultural Studies. In Bassnett, Susan and André Lefevere (eds.), *Constructing cultures. Essays on literary translation (pp. 123-140)*. Clevedon: Multilingual Matters.
- Catford, J. C. (1965). *A linguistic theory of translation: An essay on applied linguistics*. London: Oxford University Press.
- Hatim, B. (2001). *Teaching and researching translation*. Longman: Pearson Education.
- House, J. (1977). *A model for translation quality assessment*. Tübingen: Gunter Narr.
- Jakobson, R. (1959). On linguistic aspects of translation. In R. A. Brower (ed.) *On translation*. Cambridge, MA: Harvard University Press.
- Kwieciński, P. (2001). *Disturbing strangeness : Foreignisation and domestication in translation procedures in the context of cultural asymmetry*. Toruń: Wydawnictwo Edytor.
- Lefevere, A. (1992) *Translation, rewriting and the manipulation of literary fame*. London and New York: Routledge.
- Munday, J. (2001). *Introducing translation studies: Theory and applications*. London and New York: Routledge.
- Newmark, P. (1982). *Approaches to translation* . Pergamon Institute of English.
- Newmark, P. (1988). *A textbook of translation*. Prentic Hall International English Language Teaching.
- Nida, E. A. (1964). *Toward a science of translating : With special reference to principles and procedures involved in Bible translating*. Leiden: E. J. Brill.

- Nida, E. A., & Taber, C.R. (1969/1982). *The theory and practice of translation*. Leiden: E. J. Brill.
- Nida, E. A. & Waard, J. de. (1986). *From one language to another: Functional equivalence in Bible translation*. Nashville: Thomas Nelson.
- Nord, C. (1997). *Translating as a purposeful activity: Functionalist approaches explained*. Manchester: St. Jerome.
- Robinson, D. Ed. (1997). *Western translation theory: From Herodotus to Nietzsche*. Manchester: St. J.
- Schleiermacher, F. (1799). On the different methods of translating. In D. Robinson (ed.). *Western Translation Theory: From Herodotus to Nietzsche*. Manchester : St. Jerome Pub.
- Snell-Horny, M. (1986). *Übersetzungswissenschaft – ein neuorientierung, Zur integrierung von theorie und praxis*. Turbigen: Francke.
- Snell-Hornby, M. (1988). *Translation studies: An integrated approach*. Amsterdam: J. Benjamins.
- Snell-Hornby, M. (1990). Linguistic transcoding or cultural transfer? A critique of translation theory in Germany. In S. Bassnett & A. Lefevere (eds.). *Translation, history and culture*, London and New York: Pinter Publishers.
- Snell-Hornby, M. (1992). Translation as Cultural Shock: Diagnosis and Therapy. *Wei Lun Lecture Series IV*. Lecture delivered at the Chinese University of Hong Kong. December 1992.
- Snell-Hornby, M. (1998). Translation as a cross-cultural event: Midnight's Children—Mitternachtskinder. In G. Toury (Ed.) *Translation across cultures*. Bahri Publications.
- Snell-Hornby, M. (2006). *The turns of translation studies*. John Benjamins Publishing Company: Amsterdam/Philadelphia.
- Toury, G. (1980). *In search of a theory of translation*. Tel Aviv: Porter Institute.
- Toury, G. (1995). *Descriptive translation studies and beyond*. Amsterdam: J. Benjamins Pub.
- Toury, G. (2007). Culture planning and translation (in press). In A. Alvarez et al. (eds.) *Proceedings of the vigo conference "anovadores de nós - anosadores de vós"*.

- Venuti, L. (1992). *Rethinking translation: Discourse, subjectivity, ideology.*: London: Routledge.
- Venuti, L. (1995). *The Translator's invisibility: A history of translation.*: London: Routledge
- Vermeer, H. J. (1986). Übersetzen als kultureller Transfer. In M. Snell-Horny (ed.), *Übersetzungswissenschaft – Ein Neuorientierung, Zur Integrierung von Theorie und Praxis* (pp. 30-53). Tübingen: Francke.
- Vermeer, H. J. (1996). *A Skopos theory of translation: Some arguments for and against.* Heidelberg: Textcontext.
- Even-Zohar, Itamar. (1990). Translation and Transfer. *Poetics Today*, 11(1), 73-78.

Ling Wang received her B.A. in English Literature and M.A. in Translation from the Fudan University and her Ph.D. in Translation Studies from the City University of Hong Kong. She has been lecturing in the Department of Translation, The Chinese University of Hong Kong since 2004, teaching translation principles, legal translation and interpretation. She is the Executive Secretary of the Hong Kong Translation Society. Her research interest and publications are in the areas of translation and culture, and legal translation. Address: Department of Translation, The Chinese University of Hong Kong, Shatin, Hong Kong. Email: ling@arts.cuhk.edu.hk.

King Kui Sin received his B.A. and M.A. from the Chinese University of Hong Kong and his PhD from the Southern Illinois University. He is now Associate Professor at the Department of Chinese, Translation and Linguistics, City University of Hong Kong, teaching legal translation, translation theory, and philosophy of language. He worked in the Judiciary as a court interpreter from 1978 to 1980. From 1980 to 1987 he was engaged by a French oil corporation based in China operating training in English, translation and interpretation. He served on the Bilingual Laws Advisory Committee from 1990 to 1997 and appointed MBE (Member of the Most Excellent Order of the British Empire) by the British Government for his contribution to the translation of Hong Kong laws into Chinese. His research interest and publications are in the areas of language and law, and the philosophy of language. Address: Department of Chinese, Translation and Linguistics. Email: ctsinkk@cityu.edu.hk.

